IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1880

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of The TI CORPORATION (OF CALIFORNIA),

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of THE TI CORPORATION (OF CALIFORNIA) (hereinafter referred to as "the Petitioner," "The Company" or "Title Guarantee"), respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on April 2, 1976.

Opinions Below

The opinion of the Court of Appeals is not yet officially reported. It is annexed as *Appendix A* (pp. 1a-18a). The

Court of Appeals' judgment, entered April 2, 1975, is annexed as *Appendix B* (pp. 19a-20a). The opinions and orders of the United States District Court for the Southern District of New York, entered October 10, 1975, and November 28, 1975, respectively, are officially reported at 407 F. Supp. 498, and are annexed hereto as *Appendix C* (21a-42a).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether Exemptions 7(A), (C), (D) or 5 of the Freedom of Information Act, as amended, 5 U.S.C. §552(b)(7)(A), (C), (D) or (b)(5), exempt from disclosure in all "open" cases prior to hearings therein, affidavits furnished by a union to the National Labor Relations Board in support of its unfair labor practice charge against an employer.

2. Whether Exemptions 7(A), (C), (D) or 5 of the Freedom of Information Act, as amended, exempt from disclosure in all "open" cases prior to hearings therein, other affidavits obtained by N.L.R.B. agents during the Board's investigation of an unfair labor practice charge against an employer.

3. Whether this Court's decision in *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974), is applicable to an injunction staying Board proceedings pending N.L.R.B. appeal of a final order granting F.O.I.A. disclosure of documents involved in those proceedings, and if

so: (a) whether the district court has jurisdiction to grant such an injunction; and (b) assuming the Court has jurisdiction, whether such an injunction is appropriate in the circumstances.

Statutes Involved

The relevant provisions of the Freedom of Information Act, as amended, 5 U.S.C. §552 (hereinafter "the F.O.I.A." or "the Act") and the National Labor Relations Act, as amended, 29 U.S.C. §§151, *et seq.* (hereinafter "the N.L.R.A."), are annexed in *Appendix D* (pp. 43a-47a).

Statement of the Case

This case presents the question of whether, under the F.O.I.A., affidavits furnished by a Union to the N.L.R.B. in support of its unfair labor practice charge against an employer, or other statements taken during the investigation of such charge, may ever be obtained by a respondent employer prior to the hearing on a Board complaint issued at the conclusion of the investigation. The District Court said such statements may be obtained. The Court of Appeals reversed.

Title Guarantee is engaged in the sale of title insurance at various locations throughout New York State. Since the early 1940's, District 65, Wholesale, Retail, Office and Processing Union, Distributive Workers of America ("the Union"), and its predecessor organization have represented employees of the Company at its offices in the New York metropolitan area. Title Guarantee has no history of unfair labor practices with respect to the unit represented by the Union.

On February 20, 1975,[1] the Company and the Union commenced collective bargaining negotiations for an agreement to replace the one expiring on June 1. At a negotiating session held on May 23, however, the Company stated that it would no longer bargain with the Union, because the Union did not represent a majority of its unit employees. Present at this meeting were two attorneys representing the Company, two salaried Union officials, and three employees who were members of the Union negotiating committee. All present were known to one another.

The Union, on May 28, responded by filing an unfair labor practice charge with the Board's Regional Office in Manhattan, which was later twice amended. (N.L.R.B. Case No. 2-CA-13745). The charge and amendments were signed by the Union officials present at the negotiation session on May 23. At least one of these officials supplied an affidavit in support of the charge, since the Board's General Counsel *requires* that a charging party promptly submit *its* proof in support of its allegations. N.L.R.B. Casehandling Manual, Part One (Unfair Labor Practice Proceedings), §§10056, 10056.1 (1975) (App. D, 51a-52a). The gravamen of the Union's allegations was that Title Guarantee had unlawfully refused to bargain with the Union in violation of §8(a)(5) and (1) of the N.L.R.A., 29 U.S.C. §158 (a)(5) and (1) (*Id.*, 47a).

In accordance with its customary practice in such cases, the Board's regional office conducted an investigation of the Union's charge. N.L.R.B. Statements of Procedure, Series 8, as amended, §101.4, 29 C.F.R. §101.4 (App. D, 50a-57a). Board agents interviewed one or more of the Union representatives and employees present at the May 23 negotiating

[1] All events hereinafter described occurred in 1975, except as otherwise noted.

session, and may have obtained additional written statements from these individuals concerning discussion at that session.[2] The N.L.R.B. Casehandling Manual, *supra,* provides that, "[w]henever possible, the charging party's case, if one exists, should be established through interviews with the charging party and witnesses offered by the charging party." *Id.*, §§10056, 10056.2. The statements obtained in these interviews are to be reduced to affidavit form, the "keystone of the investigation." *Id.*, §§ 10058.1, 10058.2, 10058.5. A failure of cooperation in this respect may result in a solicited withdrawal or dismissal of the charge, since cooperation in a Board investigation is a "basic requirement" for a charging party. *Id.*, §§10056.1, 10058.2. In this case, a Board agent also interviewed the Company attorneys present on May 23 about their recollections of the negotiating session, although no affidavits were taken from the attorneys. *Id.*, §§10056.4, 10056.5 (App. D, 51a-57a).

On June 30, the Regional Director issued an administrative complaint charging the Company with a §8(a)(5) and (1) violation for unlawfully refusing to bargain. No other independent violation of the N.L.R.A. was asserted. A hearing on the complaint was ultimately set for October 14, 1975.

Upon issuance of the Board complaint, pursuant to N.L.R.B. Rules & Regulations, Series 8, as amended, §102.117(c)(1), 29 C.F.R. §102.117(c)(1), Title Guarantee filed an F.O.I.A. request with the Regional Director of the N.L.R.B. asking that "copies of all written statements,

[2] The District Court found, "In the case at bar, . . . the material requested consists solely of statements made in support of the Union's charges." (App. C. 27a). It appears, however, that only one statement was taken, in view of the Board's allusion to "the individual whose affidavit is sought" in its Opposition to Title Guarantee's Motion for Stay of Mandate (at p. 5).

signed or unsigned, contained in the Board's case file . . . be made available for inspection and copying" and that "any such statements taken subsequently also be made available." A denial of this request was appealed to the Board's General Counsel pursuant to §102.117(c)(2)(ii) of Board's regulations, 29 C.F.R. §102.117(c)(2)(ii), but the appeal, too, was denied. The Regional Director and the General Counsel each relied on Exemption 7(A), (C) and (D) of the F.O.I.A., 5 U.S.C. §552(b)(7) (A), (C), (D), in denying the request and appeal, respectively; neither cited Exemption 5, 5 U.S.C. §552(b)(5) (App. D, 44a-45a).

Title Guarantee thereupon instituted this action on August 5. On September 9, the Board moved to dismiss the complaint, or in the alternative, for summary judgment, asserting that the statements sought by Title Guarantee were exempt from disclosure pursuant to Exemptions 7(A), (C), (D) and 5.[3] This motion was not supported by any affidavits particularizing the Board's contentions to the facts of this case. The Company thereupon filed a cross-motion for summary judgment in its favor.

On October 1, a hearing on the motions was conducted by the District Court. The Board introduced no testimonial or other evidence in support of its contentions. Following oral argument, the Court directed the Board to submit the statements for *in camera* inspection. 5 U.S.C. §552(a)(4)(B).

On October 10, after conducting such an inspection, the District Court rendered its Opinion on the merits of the

[3] On the same date, the Board's Acting Chief Administrative Law Judge denied a pre-trial motion by Title Guarantee in the unfair labor practice proceeding made, in part, pursuant to the F.O.I.A., to compel production of the Board's statements. The Judge ruled that the Company's recourse was to the District Court, and not to the Board in the administrative proceeding.

case (App. C, 21a-35a). The Court rejected the Board's contentions that the statements sought were immune from compulsory disclosure under F.O.I.A. Exemptions 7(A), (C), (D) and 5. It also concluded that this Court's decision in *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974), was no bar to the exercise of its injunctive power against Board proceedings in this case, and in fact, supported its exercise. Accordingly, the District Court directed the Board to produce the requested materials forthwith.[4] Failing that, the Court ruled, "the Board is enjoined from conducting any hearings in this matter until such time as it complies with this decision." (*Id.*, 35a).[5]

The Board did not comply with the District Court's disclosure order. Instead, on October 14 it postponed *sua sponte* its unfair labor practice hearing *sine die,* and on October 20, appealed. Two days later the Board moved in the District Court for a stay of the October 10 Order pending appeal. The Company opposed this motion, since the granting thereof would have permitted the Board to conduct its unfair labor practice hearing without first providing Title Guarantee with the statements ordered disclosed.

On November 28, the District Court rendered an Opinion denying the Board's motion. The Court reaffirmed its earlier holdings rejecting the Board's exemption claims,

[4] The Court did *not* require the Board to delay its scheduled hearing in the event of immediate compliance.

[5] The District Court orally advised the parties of its determination on Wednesday, October 8, and inquired of the Board whether it would comply with the disclosure mandate, or voluntarily postpone its October 14 hearing. On October 9, the Board responded that it would do neither. The Court thereupon advised the Board that it would stay its unfair labor practice hearing. On Friday, October 10, at approximately 5:00 P.M., the Court issued its Opinion and Order. (Monday, October 13, was a legal holiday, and the Court and Board offices were closed.)

and further explained its reasoning for enjoining agency proceedings. (App. C, 35a-42a).

The N.L.R.B. renewed its application for a stay in the Court of Appeals. Following oral argument, that Court denied the Board's motion on January 13, 1976.

The Second Circuit rendered its Opinion on the merits of the appeal on April 2, 1976 and entered judgment the same day (App. A, 1a-18a; App. B, 19a-20a). Stating that it was "almost persuaded by [Title Guarantee's] argumentation and that of the district court" (*id.*, 16a), the Court of Appeals nevertheless reversed the District Court's judgment on the ground that the Board's investigative statements were within F.O.I.A. Exemption 7(A). In view of its disposition, the Court of Appeals did not find it necessary to decide whether the statements were also exempt under Exemptions 7(C), (D), and 5, or whether the District Court improperly enjoined N.L.R.B. proceedings, as the Board claimed, although the Court discussed these issues in notes to its Opinion. The Court of Appeals remanded the cause to the District Court with instructions to vacate its order staying the Board's proceedings. (*Id.*, 18a; App. B, 20a).

Title Guarantee timely sought a stay of mandate pending disposition of the instant petition. 28 U.S.C. §2101(f); F.R. App. P. 41(b). Over the Board's opposition, this motion was granted on May 3, 1976, and a further stay of mandate was granted on June 3, 1976.

Reasons for Granting the Writ

The decision of the Court of Appeals is one of first impression under the amended Freedom of Information Act. This decision, as well as the issues which the Court

left unresolved, raise novel questions of federal statutory construction, which are of general public interest. These questions have proved troublesome to the lower courts and have resulted in many conflicting decisions. See, *Appendix E*, annexed hereto at pp. 58a-76a.[6] The intent and meaning of the amended F.O.I.A. are in doubt. Thus, an early and definitive ruling by the Supreme Court is desirable.

The conclusion that Supreme Court review is warranted is reinforced by the Board's own observations on the operation of the amended F.O.I.A. as it affects that agency. In their 1975 annual report to Congress under the Act, submitted on March 1, 1976, pursuant to 5 U.S.C. §552(d) (annexed as *Appendix F*, pp. 77a-88a), Board Chairman Betty Southard Murphy and General Counsel John S. Irving commented on the high volume of intra-agency F.O.I.A. proceedings:

> "During the past year, . . . parties to proceedings before the Board have increasingly resorted to Freedom of Information Act procedures and law suits in an effort to obtain materials from the investigatory files—i.e., affidavits, attorney memoranda, etc.—not available to them at that time under agency procedures. Thus, almost 40% of the initial requests are from parties to a pending proceeding seeking records pertaining to the

[6] According to information compiled by the Board, 70 F.O.I.A. cases have been instituted to obtain N.L.R.B. documents in 1975 and 1976; twenty of these cases have reached the courts of appeals. A substantial majority of the district court cases, and all but three of the courts of appeals cases, involve demands for N.L.R.B. statements obtained by the Board in connection with the investigation of unfair labor practice charges in a pending agency proceeding against the F.O.I.A. plaintiff. An additional case involves a demand for such statements in a pending back pay proceeding. Seventeen appellate court cases are pending. (App. E, 58a-76a).

proceeding.[7] * * * All but one of the 116 determinations on appeal were similarly from parties seeking investigatory file documents.[8] *By the end of the year such appeals were being received at the rate of about 50 per month* and at year's end there were 44 appeals . . . pending determination. This situation prevails notwithstanding that the Supreme Court in *Renegotiation Board* v. *Bannercraft,* 415 U.S. 1 (1974), has made it clear that the FOIA was not intended to serve as a discovery tool and does not accord litigants any greater access to investigatory and adjudicative files than previously existed. See also, *N.L.R.B.* v. *Sears, Roebuck and Co.,* 421 U.S. 132.

(App. F, 85a) (Emphasis added). The Board officials then reflected on the "flood of litigation" against the agency in the district courts:

"The same phenomenon of use of the FOIA as a discovery tool pervades the flood of FOIA litigation this Agency has experienced in the federal district courts. During the report year the Agency was respondent in 31 FOIA proceedings in district and appellate courts, of which 23 are still open, 8 of them on appeal. *Further, new FOIA suits are now being filed by parties to Board proceedings at a rate of 20 per month.* In most of the suits an injunction is sought to restrain the Board hearing in its [proceeding] until the federal

[7] There was a total of 1613 such requests in 1975. *Id.,* at 77a. Of the 450 denials of such requests (in whole or in part), Exemption 7(A) was relied upon in 409 determinations; Exemption 7(C) was relied upon in 396 determinations; Exemption 7(D) was relied upon in 312 determinations; and Exemption 5 was relied upon in 392 determinations. *Id.,* at 77a-78a.

[8] One hundred four (104) of the appeals were denied in full. *Id.,* at 82a.

suit is resolved. The determinations at issue in these suits routinely involve applications of Exemptions 5 and 7 to information and documents in the investigatory files. It is our confident expectation that the Agency's positions in this respect will prevail, founded as they are upon Supreme Court holdings in *N.L.R.B.* v. *Sears, Roebuck and Company, supra, Renegotiation Board* v. *Grumman Aircraft,* 421 U.S. 168, *Renegotiation Board* v. *Bannercraft, supra,* and other strong decisional authority." *Id.,* at 85a-86a (Emphasis added).

They concluded, however:

"*[U]ntil the issues are resolved by the courts, this vexatious flood of litigation will continue to burden the Agency's resources.*"

Id., at 86a. (Emphasis added).

While we do not share many of the views expressed in these passages, we think they clearly demonstrate the impact the F.O.I.A. has had upon the operations of the Board, and the need for Supreme Court review in this important area.

This Court has recently decided a substantial number of cases arising under the F.O.I.A. exemptions.[9] It has not had an opportunity, however, to pass upon the merits of an Exemption 7 claim. *See, N.L.R.B.* v. *Sears, Roebuck &*

[9] *See, E.P.A.* v. *Mink,* 410 U.S. 73 (1973) (Exemptions 1, 5); *N.L.R.B.* v. *Sears, Roebuck & Co.,* 421 U.S. 132 (1975) (Exemption 5); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.,* 421 U.S. 168 (1975) (Exemption 5); *Administrator, F.A.A.* v. *Robertson,* 422 U.S. 255 (1975) (Exemption 3); *Department of the Air Force* v. *Rose,* —— U.S. ——, 44 L.W. 4503 (No. 74-489, decided April 21, 1976) (Exemptions 2, 6). *See also, Renegotiation Board* v. *Bannercraft Clothing Co., supra* (stay of agency proceedings pending disposition of F.O.I.A. claim).

Co., supra, n. 9, 421 U.S. at 162-165.[10] Here, unlike the situation in *Sears, Roebuck,* the Exemption 7 issues *have* been fully litigated under the amended F.O.I.A. and the Supreme Court *would* have the benefit of two district court decisions and one court of appeals opinion discussing those issues.

Finally, because this is a case of first impression in the courts of appeals, the impact of the Second Circuit's opinion will likely be felt in areas beyond the N.L.R.B. setting, even though the decision is limited by its terms to Board proceedings (App. A, 16a). The Court of Appeals' rationale is adaptable to other Exemption 7(A) claims, and nothing in the amended F.O.I.A. or its legislative history suggests that a special approach is mandated for cases involving the Board. The resolution of issues of statutory interpretation now, before the errors asserted herein infect decisions involving other agencies,[11] would further the vindication of F.O.I.A. rights. It would also serve the interest of judicial economy. Review by this Court is therefore warranted.

I.

Exemption 7(A)

The decision of the Court of Appeals that *all* statements obtained by the N.L.R.B. from employees, or their representatives, in connection with N.L.R.B. unfair labor prac-

[10] Nor has it been presented with the other issues raised in this petition, *infra* pp. 19-24.

[11] The Court of Appeals' opinion has already been followed by the First Circuit in another case involving this agency, *Goodfriend Western Corp., d/b/a Wrangler Wranch* v. *Fuchs,* —— F.2d ——, 92 L.R.R.M. 2466 (1st Cir., No. 76-1116, May 6, 1976) (*per curiam*).

tice proceedings are not subject to disclosure during the pendency of such proceedings as a result of Exemption 7(A), is erroneous and should be reviewed.

The Court of Appeals reasoned, in substantial agreement with the Board, that if any such statements were required to be disclosed, interference with Board proceedings "could well" result in two ways:

> "first, suspected violators *might be able to use disclosure* to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; [and] second, employees who are interviewed *may be reluctant,* for fear of incurring employer displeasure, to have it known that they have given information, . . . or union officials *might not want to volunteer information* for fear of compromising the union's position in negotiations. . . ." (App. A, 13a-14a) (Emphasis added).

These concerns, it concluded, brought the Board's statements within the purview of amended Exemption 7(A) (*Id.,* 14a). We disagree.

A. *The Court of Appeals Failed to Apply the Proper Standard to Justify Withholding.*

The Second Circuit ruled as a matter of law, and without reference to the contents of the statement or the context of the case, that *a probability of possible interference* inherent in enforcement proceedings is sufficient to invoke Exemption 7(A) in all "open" Board cases. Once, this may have been the law. 5 U.S.C. §552(b)(7) (1967); *Wellman Industries, Inc.* v. *N.L.R.B.,* 490 F.2d 427, 430-431 (4th Cir.), *cert. denied,* 419 U.S. 834 (1974), *citing* H.R. Rept. No. 1497, 89th Cong., 2d Sess., 11 (1966), and S. Rept. No. 813,

89th Cong., 1st Sess. 9 (1965) (App. A, 8a n.8, 11a).[12] But, certainly, it is the law no longer. The Government must now *"show"* that : (a) "its case in court . . . *would be harmed* by the premature release of evidence not in the possession of known, or potential defendants," or (b) "the disclosure of the information *would substantially harm* such proceedings by impeding any necessary investigation before the proceeding": *provided,* however, that "it is only relevant to make such determination *in the context of the particular enforcement proceeding.*" 120 Cong. Rec. S9330 (daily ed. May 30, 1974) (Remarks of Senator Hart) (Emphasis added). (App. A, 12a n. 12).[13]

The Court of Appeals failed to hold the Board to the appropriate standard to justify exemption. The F.O.I.A. emphasizes that courts should conduct *factual* inquiries. An asserted, general likelihood of possible interference such as is relied on here does not satisfy the particularized

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[12] *See,* 110 Cong. Rec. 17086 (July 28, 1964) (Remarks of Senators Humphrey and Long), reprinted in *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles,* Committee Print (U.S. Senate, Comm. on the Judiciary, Subcomm. on Adm. Prac. & Proc.), 93d Cong., 2d Sess., 103, 110-113 (1974), amending the seventh exemption of S.1666, a predecessor bill to the F.O.I.A. of 1967, to substantially the form found in the original Act. It appears from this colloquy that the limitation clause of the 1967 Exemption 7—"except to the extent available by law to a private party," 5 U.S.C. §552(b)(7) (1967)—may have been specifically intended to incorporate the Board's "Jencks rule", presently §102.118(b)(1) of the N.L.R.B. Rules & Regulations, 29 C.F.R. §102.118(b)(1) (1975) (App. D, 49a), into the Exemption. S.1666, however, was not enacted. *Source Book, supra,* at 8.

[13] *See,* 5 U.S.C. §552(a)(4)(B) (providing for *in camera* inspection and placing the burden on the Government to justify its withholding); and, S.Rept. No. 93-854, 93d Cong., 2d Sess., 17 (1974); S.Conf.Rept. No. 93-1200, 93d Cong., 2d Sess., 7-8 (1974), discussing this provision. The Senate Report, in particular, addresses the appropriateness of *in camera* inspection in Exemption 7 cases. *Id.*

showing of harm in an individual case contemplated by the Act. As this Court recognized in *N.L.R.B.* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 163-164, Congress in 1974 *disapproved* of those decisions standing for the proposition

> "that once a certain *type* of document is determined to fall into the category of 'investigatory files' the courts are not to inquire whether the disclosure of the *particular* document in question would contravene any of the purposes of Exemption 7." (Emphasis in original).

Here, this admonition was ignored; the Board was improperly relieved of its statutory burden.

The Fifth Circuit recently emphasized the evidentiary nature of the Government's burden in *Kent Corp.* v. *N.L.R.B.,* —— F.2d ——, 92 L.R.R.M. 2152 (5th Cir., No. 74-1710, April 21, 1976), where it stated that:

> "In order to make consideration of FOIA claims both thorough and efficient, courts should be prepared to employ a judicious blend of affidavit evidence, oral testimony, and *in camera* inspection. *EPA* v. *Mink,* 410 U.S. 73, 92-94, 93 S.Ct. 827, 838, 35 L. Ed. 2d 119, 135-36 (1973); *see generally Comment, In Camera Inspections Under The Freedom Of Information Act,* 41 U. Chi. L. Rev. 557 (1974)."

92 L.R.R.M. at 2161 n. 30.

Here, the District Court was willing to employ such a blend, but the Board only produced the statements for *in camera* inspection. It offered no affidavits or oral testimony. It made no evidentiary showing that the asserted *possible* harms were *in fact likely* to result from disclosure *in this case.* The District Court, upon review of the statements, failed to discern a substantial likelihood of actual harm to this enforcement proceeding from disclosure (App.

C, 33a). The Court of Appeals, however, dispensed even with the need for *in camera* inspection in favor of a *per se* rule.

Relying on an interpretation of the Attorney General, the Court of Appeals mistook an element of the Government's proof—a showing that "premature release" *would* interfere with enforcement proceedings—for a rule of substantive law: that such release itself constitutes interference (App. A, 16a). It failed even to inquire whether the "information" sought was or was not "'possessed by known . . . adverse parties.'" (*Id.*).

This Court should grant review to correct this substantial error.

B. *The Court of Appeals Misconstrued the Meaning of "Interference."*

There is little basis for the Second Circuit's reading of "interference" to include employee reluctance to provide statements for fear of incurring their employer's displeasure[14] and still less to include the possibility that "union officials might not want to volunteer information for fear of compromising the union's position in negotiations. . . ." (App. A, 13a-14a). None of the Second Circuit's opinions cited to support the latter proposition deal with the statements of union officials (*Id.*, 13a-15a). This doctrinal extension appears to be nothing more than an invention designed to meet the facts of the case.

Even if we are to assume that these concerns are valid, they would not fall within the "interference" rubric of Exemption 7(A) in the circumstances presented. The

[14] *See, N.L.R.B.* v. *Schill Steel Products, Inc.*, 408 F.2d 803 (5th Cir. 1969); *cf. N.L.R.B.* v. *Scrivener (A.A. Elec. Co.)*, 405 U.S. 117 (1972).

Board's investigation was complete at the time the statements were sought, for the Regional Director had already issued a complaint. Thus, there could be no substantial harm to the Board's proceedings "by impeding any necessary investigation before the proceeding." 120 Cong. Rec. S9330 (May 30, 1974) (Remarks of Senator Hart). And while these concerns might still be relevant to a claim under the "confidential source" exemption of §552(b)(7)(D), a point we do not concede, the Court of Appeals did not decide the Exemption 7(D) issue (App. A, 10a n. 11). At most, it suggested that the District Court's rejection of the claim was supported by the weight of authority. (*Id.*) The Supreme Court should define the meaning of "interference" with enforcement proceedings in Exemption 7(A).

C. *The Court of Appeals Unduly Restricted the Scope of the 1974 Amendment.*

The Court of Appeals noted that "[t]he cases that Exemption 7(A) was intended to overrule were for the most part *closed* investigative file cases." (App. A, 15a-16a, emphasis in original; 8a). It does not follow, however, as the Court also concluded, that it was "with this particular problem of unavailability of closed files in mind that the 1974 amendments to Exemption 7 were adopted." (App. A, 13a).

Nowhere in the legislative history of the 1974 amendments is disclosure expressly limited to closed investigatory files. To be sure, the Government's refusal to disclose closed files was an egregious form of withholding which Congress sought to prevent. But a showing that enforcement proceedings were pending was only the beginning of the inquiry which Congress sought to require, not an end. Congress intended that the Government should establish the likelihood of actual "prejudice" or "harm" to its in-

vestigation or enforcement proceeding as a result of disclosure,[15] for it:

(1) Narrowed the withholding authorized by Exemption 7 from "investigatory *files*" to "investigatory *records*";[16]

(2) Deleted the "external" standard for disclosure contained in the 1967 Exemption (". . . except to the extent available by law to a party other than an agency");

(3) Authorized explicitly the judicial *in camera* inspection of *any* records in dispute, including those claimed to fall within Exemption 7;[17] and,

(4) Articulated the need to disclose "[a]ny reasonably segregable portion of a record . . . to any person. . . ." after appropriate deletions.[18]

Congress would not have taken these pains had it intended to create a blanket exemption for any class of "open" investigatory files. In short, the 1974 amendment did not simply codify pre-amendment caselaw, as the Board has argued (App. C, 37a). It resulted in a substantive change in the law.

The Court of Appeals' decision departs from the letter and intent of the amended Act. Its holding disregards the statutory mandate that the *court* must determine *de novo* in the particular case whether or not a record is exempt

[15] 120 Cong. Rec. S9320 (May 29, 1974) (Remarks of Senator Hart); 120 Cong. Rec. H10868 (November 20, 1974) (Remarks of Congressman Reid).

[16] Compare, 5 U.S.C. §552(b)(7) (1967) (App. D, 46a) with 5 U.S.C. §552(b)(7) (1975) (*Id.*, 44a-45a).

[17] *See* n. 13, *supra* p. 14.

[18] 5 U.S.C. §552(b) (1975) (App. D, 45a).

from disclosure. A court may not defer to a restrictive agency rule and its own apologia therefor, as the Court of Appeals evidently has done here (App. A, 6a, 15a).[19] The Court's rationale also goes too far: much of it could be used to justify withholding in *closed* Board proceedings, a result plainly antithetical to amended Exemption 7. Employees never called as witnesses "may [still] be reluctant" to provide statements if their cooperation will eventually become known to their employer (App. A, 13a). And union officials "might [still] not want to volunteer information" for fear that disclosure would compromise future negotiations (*Id.*, 13a-14a). Congress did not contemplate such a wooden application of the exemption. A Supreme Court corrective is needed.

II.

Exemptions 7(C), (D) and 5: The Need for an Omnibus Resolution

We ask the Court to review the Board's other claims under Exemption 7(C) and (D) as well, for the Board consistently invokes them in denying disclosure of investigative statements. *See,* N.L.R.B. Office of the General Counsel, "Guidelines for Processing of Requests Under the Freedom of Information Act," July 8, 1975 ("F.O.I.A. Guidelines")[20];

[19] The Court of Appeals may have departed even further from the Act's requirements by shifting the burden of proof to the F.O.I.A. plaintiff. Its decision has been interpreted to require a court to "rule out all possibility that the company may 'be able to use disclosure to learn the Board's case in advance and frustrate the proceeding. . . .'" before disclosure may be ordered. *Goodfriend Western Corp., d/b/a Wrangler Wranch* v. *Fuchs, supra,* 92 L.R.R.M. at 2467.

[20] The F.O.I.A. Guidelines have been republished in the *White Collar Report,* No. 957, August 8, 1975, at pp. C-1 *et seq.* (Bureau

the Board's 1975 annual F.O.I.A. report (App. F, 78a); and, cases cited in *Appendix E* (58a-76a).[21]

While Exemption 5 is not recommended in the F.O.I.A. Guidelines as a basis for denying disclosure of N.L.R.B. statements, the Board has nevertheless invoked it in much F.O.I.A. litigation involving such statements.[22] A number of district courts have found merit in the Board's position.[23] However, the Board's recent construction is not justified by this Court's decision in *N.L.R.B.* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 149-155. The documents sought are neither confidential intra-agency advisory opinions nor matters falling within the attorney-client or attorney work-product privileges. *Id.*, at 149. The District Court's holding in this case finds recent support in *Kent Corp.* v. *N.L.R.B., supra,* distinguishing the Board's final investigation reports found to be exempt from "primary information, such as verbatim witness testimony or objective data. . . ." 92 L.R.R.M. at 2161.[24]

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of National Affairs, Inc., Washington, D.C.): *see* pp. C-11 (Index); C-14 (Response No. 7A-3); *and,* C-16 (Responses Nos. 7C-3, 7D-3). A copy of the F.O.I.A. Guidelines has been lodged with the Clerk of the Court.

[21] *Department of the Air Force* v. *Rose, supra,* decided three weeks after the Court of Appeals' decision in Title Guarantee, construes Exemption 6, 5 U.S.C. §552(b)(6), upon which Exemption 7(C) is based, in a manner consistent with the District Court's opinion. 44 L.W. at 4510, 4511 n.16. However, the District Court did not view the disclosure of the statements here as constituting an "invasion of personal privacy" within the meaning of either exemption, and thus did not reach the issue of whether such invasion would be simply "unwarranted" (Exemption 7(C)), "clearly unwarranted" (Exemption 6), or neither. *See, id.*, at 4511 n.16. (App. C, 33a-34a).

[22] *See,* Appendix F (at p. 78a) and cases cited in Appendix E (58a-76a).

[23] *Hook Drugs, Inc.* v. *N.L.R.B.*, —— F.Supp. ——, 91 L.R.R.M. 2797 (S.D.Ind., No. IP-76-24-C, decided March 5, 1976); *Jamco International, Inc.* v. *N.L.R.B.*, —— F.Supp. ——, 91 L.R.R.M. 2446 (N.D.Okla., No. 76-C-3, decided February 11, 1976), *appeal pending* (10th Cir., No. 76-1281) (App. E, at 68a, 74a).

Assuming this Court disagrees with the Second Circuit's view of Exemption 7(A), it will still have to resolve the Exemption 7(C), (D) and 5 issues before it becomes clear whether or not the N.L.R.B. is entitled under the Act to withhold all statements in pending administrative cases. And since the F.O.I.A. disclosure mandate "does not apply" if the Government can establish its right to even a single exemption, *N.L.R.B.* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 154 n. 21, a piecemeal resolution of the Board's multiple-exemption claim under the F.O.I.A. seems probable. The sure and prompt enforcement of the Act desired by Congress requires greater certainty than this procedure affords: for the real issue is whether the F.O.I.A. *ever* requires the Board to disclose its statements in a pending proceeding. A decision limited to Exemption 7(A) will not answer that question.

III.

The Power to Enjoin Board Proceedings: The Practical Imperative

Since evidentiary hearings on unfair labor practice complaints are conducted relatively quickly by the Board,[25] an agency litigant's ability to vindicate its rights under the Act may frequently depend upon whether it obtains a stay

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[24] The Court of Appeals in the instant matter rejected the Board's Exemption *7(A)* claim premised on the contention that "these affidavits constitute attorney 'work product' revealing investigative and prosecutional strategy." (App. A, 14a). The Court, however, did not explain its holding, or the applicability of Exemption 5 with respect to this argument.

[25] Unfair labor practice hearings are now generally scheduled 6 to 8 weeks after issuance of a Board Complaint.

of a Board hearing pending court disposition of its F.O.I.A. claim. The 1974 amendments were intended to expedite F.O.I.A. litigation. *See, e.g.*, 5 U.S.C. §552(a)(4)(C), (D) (App. D, 44a). Nevertheless, the Government still has 30 days to respond after service of a complaint, §552(a)(4)(C), and the resolution of the case, even on an expedited basis, may take weeks longer.[26] The Board's hearing may easily take place before the district court renders its decision.[27] The District Court in this case concluded that since N.L.R.B. complaint proceedings *did* present a case where irreparable harm would ensue absent court intervention, and the holding in *Renegotiation Board* v. *Bannercraft Clothing Co., supra,* 415 U.S. at 20, denying an injunction, was expressly limited to Renegotiation Board proceedings, it was not barred from granting injunctive relief (App. C, 25a, 35a; 38a, 40a). The Court of Appeals appeared to hold that the District Court had jurisdiction to enjoin Board proceedings (App. A, 3a n.4, 5a n.5).[28]

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[26] In the instant matter, Title Guarantee filed its complaint on August 5. The District Court's decision, issued upon cross-motions for summary judgment and without an evidentiary hearing, was entered on October 10.

[27] Prior to the Second Circuit's decision in this case, a number of Board Regional offices had agreed to postpone hearing dates where related F.O.I.A. litigation was pending. We understand that policy has now changed.

[28] We agree with the District Court that an injunction was proper in the circumstances. However, we question whether *Bannercraft* was pertinent to its decision. The Board hearing had been postponed to October 14 for reasons unrelated to this case, and the District Court decided the merits of the F.O.I.A. claim prior to the commencement of the rescheduled hearing. The injunction was issued only after the Board said it would not comply with the Court's decision or voluntarily postpone its hearing pending its appeal in the F.O.I.A. action. Thus, the Court's injunction was issued to insure effectuation of its judgment, rather than simply to give it time to consider the merits of the F.O.I.A. claim.

The 1974 F.O.I.A. amendments and their legislative history support the issuance of the injunction here. Congress expressly considered *Bannercraft* in drafting the 1974 amendments. It read the case for the broad proposition that district courts could enjoin administrative proceedings pending a judicial determination of the applicability of the Act to documents involved in those proceedings. S. Rept. No. 93-854, *supra,* 13. Congress evidently believed that the courts should exercise this authority, for it extended the Act's mandate to expedite F.O.I.A. actions from the trial level to the appellate stage. 5 U.S.C. §552(a)(4)(D); S. Conf. Rept. No. 93-1200, *supra,* 8; S. Rept. No. 93-854, *supra,* 13. No exception was made for N.L.R.B. proceedings. Thus, the 1974 legislative history strongly suggests that if *Bannercraft* applies to post-decisional injunctions, the District Court acted properly in this case.

The Board, however, has argued repeatedly that its proceedings should not brook interference by the judiciary, even in F.O.I.A. cases, relying on *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938), among other authorities.[29] A number of district courts, particularly in the Sixth Circuit, have adopted this view and held they are without jurisdiction to enjoin Board proceedings. (App. E, 64a-66a).

This Court should grant certiorari to determine the additional questions of whether *Bannercraft* applies to injunctions issued against Board proceedings pending the

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[29] The argument is found here in: (1) the Board's motion for summary judgment; (2) the Board's motion to the District Court for a stay of order pending appeal; (3) the Board's motion to the Court of Appeals for a stay of order pending appeal; (4) the Board's brief on appeal; and (5) the Board's opposition to Title Guarantee's motion for a stay of mandate.

Board's appeal of an F.O.I.A. disclosure order, and if so, whether its precepts nevertheless sustain the issuance of an injunction in the circumstances present here.

CONCLUSION

For the foregoing reasons, the Petitioner prays that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: June — , 1976
New York, New York

APPENDIX

APPENDIX A

Opinion of the Court of Appeals in Case No. 75-6119 Dated April 2, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 725—September Term, 1975.

(Argued January 26, 1976 Decided April 2, 1976.)

Docket No. 75-6119

TITLE GUARANTEE CO.,

Appellee,

v.

NATIONAL LABOR RELATIONS BOARD,

Appellant.

Before:

MOORE, OAKES and MESKILL,

Circuit Judges.

Appeal from judgment of the United States District Court for the Southern District of New York, Lee P. Gagliardi, *Judge,* holding that investigative materials obtained by NLRB in preparation for proceedings on an unfair labor practice charge are not exempt from disclosure under the Freedom of Information Act, 5 U.S.C. §§ 552(b)(5), (7)(A), 7(B), 7(C).

Judgment reversed.

JOSEPH NORELLI, Attorney, National Labor Relations Board (John S. Irving, General Counsel, Elliott Moore, Deputy Associate General Counsel, Abigail Cooley, Assistant General Counsel for Special Litigation, Na-

tional Labor Relations Board, of counsel), *for Appellant.*

ROGER KAPLAN, Jackson, Lewis, Schnitzler & Krupman, New York, N.Y., *for Appellee.*

OAKES, *Circuit Judge:*

The National Labor Relations Board appeals from an order requiring disclosure under the Freedom of Information Act (FOIA)[1] of investigative statements obtained by the Board from employees (and their union representatives) prior to an unfair labor practice hearing on a charge against their employer for refusal to bargain.[2] The United States District Court for the Southern District of New York, Lee P. Gagliardi, *Judge,* held that such statements were not exempt from the disclosure requirements of the FOIA. He expressly rejected the Board's contention that these statements fell within Exemptions 5, 7(A), 7(C) or 7(D) of the Act, 5 U.S.C. § 552(b)(5), 7(A), 7(C), 7(D).[3] Following the district court's decision on the merits of the FOIA claim, the court directed the Board to produce the

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1 5 U.S.C. § 552.

2 The charge was made under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5).

3 5 U.S.C. § 552(b) provides in part:

This section does not apply to matters that are—

. . .

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency.

. . .

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings . . . (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source . . . .

statements forthwith or stay the conduct of its administrative hearing. On the Board's appeal, we reverse.[4]

On or about May 28, 1975, District 65 Wholesale, Retail, Office and Processing Union, Distributive Workers of America (hereinafter District 65), filed an unfair labor practice charge with Region 2 of the Board alleging that the Title Guarantee Co. had violated §§ 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(3) and (1), by refusing to execute a collective bargaining agreement which had been previously agreed upon with District 65. Subsequent amendments to the charge alleged violation of § 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5). The Board conducted an investigation in the course of which it took written statements and affidavits from representatives of District 65 and employees of the Title Guarantee Co. As a result of these investigations, the Board issued a complaint against Tile Guarantee on or about June 30, 1975. The Company requested copies of all written statements, signed or unsigned, but the NLRB Regional Director denied them, asserting privilege from disclosure under the exemptions to the FOIA. This ruling was appealed to the Board's General Counsel pursuant to Agency Regulations, 29 C.F.R. § 102.117(c)(2)(ii) (1975), which was denied. Title Guarantee then filed this suit under the FOIA, claiming that the Board's failure and refusal to furnish the requested information is arbitrary and capricious and deprives it of public information, and that absent such information it will be wrongfully precluded from properly preparing its defense and will therefore suffer irreparable injury. Title Guarantee concededly has standing to bring this suit both as a member of the "public," 5 U.S.C. § 552(a), and as a "person" within the language of the statute, 5 U.S.C. § 552(a)(3), and the language of the Administrative Procedure Act,

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4 Jurisdiction in the district court is provided in 5 U.S.C. § 552(a)(4)(B).

5 U.S.C. § 551(2). The Board moved for dismissal under Fed. R. Civ. P. 12(b)(6) or alternatively for summary judgment under Fed. R. Civ. P. 56(c), and Title Guarantee cross-moved for summary judgment.

Following *in camera* review of the material in question, 5 U.S.C. § 552(a)(4)(B), the district court concluded that release of the information "would not block further information of the same type from similar sources, nor would it stifle effective preparation of the case." The court additionally found that "it does not appear that the specific enforcement proceeding would be harmed," *see* Exemption 7(a), 5 U.S.C. § 552(b)(7)(A), going on to say that whatever value Title Guarantee might gain from the information would not be based "on the timing of such release but rather on its determination of whether any material contained in the released documents supports its contention." Additionally the court found that the material in question contained "no personal matters which should be protected under exemption 7(C)" and that the Board had "not presented any evidence that the material which it sought was elicited after an express assurance of confidentiality [such as might bring it within Exemption 7(D) to FOIA]." In this connection the court reviewed the material and concluded that it was not "reasonable to infer that the statements were made under some understanding on the part of the deponent that his statements would be confidential." As the court said, "The nature of the material as well as the identity of the deponents indicates that an understanding of confidentiality or lack of it would be entirely irrelevant to whether the information would have been offered to the Board." The court concluded that the Board had failed to sustain its statutory burden of proof, 5 U.S.C. § 552(a)(4)(B), that there was an exemption from disclosure under FOIA for the investigative materials. The court directed the Board to turn over the materials sought

for inspection and copying, failing which the Board would be enjoined from conducting any hearings on the unfair labor practice charge until such time as the Board were in compliance with the court order. The court did not consider that its injunction was barred in any way by *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974).[5] The Board appeals.

Since the substantive effect of acceptance of appellant's disclosure contentions would be tantamount to the issuance of new, broader discovery rules for NLRB proceedings, it is desirable to consider, as preliminary matter, the Board's authority to promulgate rules for the conduct of proceedings before it, 29 U.S.C. § 156, as well as its responsibility to conduct such proceedings "in accordance with the rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure for the district courts of the United States . . . ." 29 U.S.C. § 160(b). This court has held, in *NLRB* v. *Interboro Contractors, Inc.*, 432 F.2d 854 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971), that the Labor-Management Relations Act does not specifically authorize or require the Board to adopt discovery procedures.[6] *See also NLRB* v. *Globe Wireless, Ltd.*, 193 F.2d 748, 751 (9th Cir. 1951). The matter of discovery in enforcement proceedings is a mat-

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5 The district court noted the express vesting of equitable jurisdiction under the Act, 5 U.S.C. § 552(a)(4)(B). The Supreme Court's opinion in *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974), was expressly limited to renegotiation cases where the nature of the process insured no irreparable harm, and by its own terms that opinion did not purport to decide "whether, or under what circumstances, it would be proper for the District Court to exercise jurisdiction to enjoin agency action pending the resolution of an asserted FOIA claim." *Id.* at 20.

6 *Accord, NLRB* v. *Lisdale Knitting Mills, Inc.*, 523 F.2d 978 (2d Cir. 1975). *But see NLRB* v. *Miami Coca-Cola Bottling Co.*, 403 F.2d 994 (5th Cir. 1968); *NLRB* v. *Safway Steel Scaffolds Co. of Georgia*, 383 F.2d 273 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968).

ter committed to the Board's rule-making power. *See NLRB* v. *Interboro Contractors, Inc., supra,* 432 F.2d at 858; *Electromec Design and Development Co.* v. *NLRB,* 409 F.2d 631, 635 (9th Cir. 1969). Since 1935 the Board rule pertaining to an enforcement proceeding, now contained in 29 C.F.R. § 102.30 (1975), has not provided for the taking of depositions for the purposes of discovery as in the case of the Federal Rules of Civil Procedure. Instead, it has permitted limited discovery only for the purpose of obtaining and preserving evidence for trial. *NLRB* v. *Interboro Contractors, Inc., supra,* 432 F.2d at 858. The policy has been said to be a "logical one," *id.,* followed by other administrative agencies and in no way affected by the Administrative Procedure Act. *Id.* at 858-59. Under the Board rules, however, affidavits become available to a litigant "after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint . . . ." 29 C.F.R. § 102.118(b)(1) (1975). The rules provide that the administrative law judge shall "order the production of any statement . . . of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified [for] examination and use for the purpose of cross-examination." *Id.* In other words, the only discovery available to the party charged with an unfair labor practice under the National Labor Relations Act, absent the requirements of the Freedom of Information Act, is equivalent to that available to a criminal defendant under the Jencks Act, 18 U.S.C. § 3500. Neither the liberal provisions of the Federal Rules of Civil Procedure pertaining to pretrial discovery nor the liberalized rules of the Federal Rules of Criminal Procedure have any bearing on Board discovery procedures. The Board rules prohibit anyone, including any employee of the Board, regional director or administrative law judge, from producing any "files, documents,

reports, memoranda, or records of the Board or of the general counsel, whether in response to a subpoena duces tecum or otherwise" except as might be required under the Freedom of Information Act or upon the written consent of the Board or the chairman of the Board. 29 C.F.R. § 102.118(a) (1975). Accordingly, if pre-hearing discovery is to be obtained as a matter of right by a party charged under 29 U.S.C. § 160 with an unfair labor practice, the source for the right must be found within the Freedom of Information Act.[7]

Before analyzing the specific exemptions claimed under and by virtue of the Act as it now reads, it is well to recall that the thrust of the FOIA since its initial enactment has been to provide for disclosure of governmental files unless an exemption is established. *See Center for National Policy Review on Race and Urban Issues* v. *Weinberger,* 502 F.2d 370, 374 (D.C. Cir. 1974). At the same time the courts have gone far prior to the 1974 amendments to protect the executive branch against disclosure. Executive security classification decisions have

7 In *NLRB* v. *Martin A. Gleason, Inc.,* Nos. 75-4018, -4045, -4047 (2d Cir. Mar. 3, 1976), slip op. 2241, 2271, the panel indicated in dictum that it read *NLRB* v. *Interboro Contractors, Inc.,* 432 F.2d 854, 857 (2d Cir. 1970), *cert. denied,* 402 U.S. 915 (1971), and *NLRB* v. *Lizdale Knitting Mills, Inc.,* 523 F.2d 978 (2d Cir. 1975), as holding that discovery was "left to the discretion of the trial examiner" which could be "abused" in event that "the appealing party demonstrates that he will be clearly prejudiced if he is denied access to the information requested . . . ." *Gleason, supra,* slip op. at 2271. We do not, regretfully, read *Interboro* and *Lizdale* so favorably toward disclosure. *Interboro* said that even if the interpretation in the Fifth Circuit cases, *see* note 6 *supra.* of NLRB Rule 102.30 to permit depositions for discovery were followed, it nevertheless would lie within Board discretion to deny same. *Interboro,* however, explicitly rejected the Fifth Circuit position, 432 F.2d at 859, finding no authorization for "the taking of depositions for discovery purposes." *Id.* at 858. *Lizdale* simply reaffirms *Interboro,* 523 F.2d at 980. At the same time *Interboro* relies on *Electromec Design & Development Co.* v. *NLRB,* 409 F.2d 631, 635 (9th Cir. 1969), which utilizes the Fifth Circuit's discretionary language.

been held nonreviewable. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 84 (1973). A number of decisions held that agencies were not even required to submit material to the court for *in camera* inspection to determine whether a claim to a given exemption was factually correct. *Frankel* v. *SEC*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972); *Center for National Policy Review on Race and Urban Issues* v. *Weinberger, supra; Ditlow* v. *Brinegar*, 494 F.2d 1073 (D.C. Cir.) (per curiam), *cert. denied*, 419 U.S. 974 (1974); *Aspin* v. *Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973); *Weisberg* v. *Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (en banc), *cert. denied*, 416 U.S. 993 (1974).[8] The courts had, in

8 *Frankel* v. *SEC*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 1972), in a divided panel held that a *closed* SEC file was not subject even to *in camera* inspection as compiled during a § 10(b) and Rule 10b-5 civil investigation of Occidental Petroleum Corporation. The court cited *NLRB* v. *Clement Bros. Co.*, 407 F.2d 1027 (5th Cir. 1969), dealing with closed labor board files. The *Frankel* majority considered that hindrance to future law enforcement through revelation of investigatory techniques and procedures or disclosure of the names of informants or persons voluntarily cooperating justified the exemption. *Weisberg* v. *Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), held material in FBI files on President Kennedy's assassination similarly privileged, quoting from Judge Hays' opinion in *Frankel* and relying principally on the need to avoid revelation of "investigatory techniques and procedures." 489 F.2d at 1199. *Aspin* v. *Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973), held the Army's review of the My Lai Incident exempt under former Exemption 7 even after there had been 15 courts martial. The *Aspin* court specifically followed *Frankel* as "well reasoned and persuasive." 491 F.2d at 29-30. *Ditlow* v. *Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974) (per curiam), followed *Weisberg* in respect to correspondence between the National Highway Traffic Safety Administration and auto manufacturers with respect to *pending* safety defect investigations which had become part of a file which "could conceivably lead to a civil enforcement proceeding." 494 F.2d at 1074. *Center for National Policy Review on Race and Urban Issues* v. *Weinberger*, 502 F.2d 370, 374 (D.C. Cir. 1974), seemed on rehearing to qualify *Weisberg* by saying that the court would be governed by "good sense and the essential heft of the case" in respect to a claim of "investigatory files" exemption. However, the court did not disturb its previous decision that HEW review of public school segregation and

at least some cases, construed the statutory exemptions from disclosure to their literal limits, reflecting no doubt the agencies' historical bias against such disclosure. The Report of the Senate Committee on the Judiciary accompanying S. 2543, which covered the basic amendments made in 1974, other than the amendments to Exemption 7 which we will discuss below, made it very clear that it was not the congressional intention that the FOIA exemptions be read broadly "either to prohibit disclosure of information or to justify automatic withholding of information." S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974); Freedom of Information Act and Amendments of 1974 (P. L. 93-502) Sourcebook: Legislative History, Texts and Other Documents 151, 158 (1975) (hereinafter "Sourcebook").[9] Rather, the exemptions "are only *permissive*" and "mark the outer limits of information that *may* be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate . . . that the information *should* be withheld." *Id.* We turn to the Board's claim of exemption.

Exemption 7 originally covered "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Under the amended Exemption 7, adopted in 1974, "investigatory reports compiled for law enforcement purposes" are exempt

discrimination practices in the North were exempt, "[w]ithout engaging in any 'balance' of considerations . . . ." 502 F.2d at 374.

9 The Senate Report duly remarked that:

> A number of agencies have by regulation adopted this position that, notwithstanding applicability of an FOIA exemption, records must be disclosed where there is no compelling reason for withholding. (*E.g.*, Interior—43 C.F.R. § 22; HEW—45 C.F.R. § 5.70; HUD—24 C.F.R. § 15.21; DOT—49 C.F.R. § 7.51.) This approach was clearly intended by Congress in passing the FOIA.

Sourcebook at 158.

from the FOIA to the extent that disclosure would "interfere with enforcement proceedings," "constitute an unwarranted invasion of personal privacy," "disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(A), (C), (D); note 3 *supra*. The Board claims that each of these rationales supports an exemption from disclosure for employee statements obtained in investigation of a pending unfair labor practice charge. Since we agree with the Board that such disclosure would "interfere with enforcement proceedings" and is therefore not required under the statute, we need not decide whether disclosure in this context invades the personal privacy,[10] or destroys the confidentiality,[11] of the Board's sources.

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10 The only element of "privacy" under Exemption 7(C) involved that has been suggested by the NLRB is the disclosure of the employees' names as persons who made statements about the pending charge. Of course, under the sixth exemption to the FOIA, which Exemption 7(C) echoes, personal and medical files are not to be ordered to be disclosed if disclosure would constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). Thus, for example, it would constitute an invasion of privacy if a corporation in the wine bobby business were entitled to obtain the names and addresses of all persons who registered with the United States Bureau of Alcohol, Tobacco and Firearms to produce wine for family use in the mid-Atlantic region. *See Wine Hobby U.S.A., Inc.* v. *IRS*, 502 F.2d 133 (3d Cir. 1974) emphasizing the fact that registrants' home addresses and personal activities, family status, control or responsibility and other personal matters would be disclosed). *See also Rural Housing Alliance* v. *United States Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974); *Ackerly* v. *Ley*, 420 F.2d 1336 (D.C. Cir. 1969). Here, however, the court below examined the material in question and "found no personal matters which should be protected under Exemption 7(C)." Its decision is supported, we might add, by *United Roofers Local No. 30* v. *NLRB*, No. 75-184 (E.D. Pa. Feb. 11, 1976), and *Cessna Aircraft Co.* v. *NLRB*, 90 LRRM 3339 (D. Kan. 1975). *But see Jamco International, Inc.* v. *NLRB*, No. 76-C-3 (N.D. Okla. Feb. 11, 1976).

11 A problem with the Board's contention that its files are protected under this exemption is that the district court found that the Board had presented no evidence that the information was elicited upon an express assurance of confidentiality. In response to an inquiry by the court, "Were these statements given under an assurance of confidentiality at the time or not?" Board counsel replied, "I don't know." The Board's position is that it is reasonable to infer an offer of confidentiality in the circumstances. The district court reviewed the material and concluded that no such inference was reasonable, stating that "the nature of the material as well as the identity of the deponents indicates that an understanding of confidentiality or lack of it would be entirely irrelevant to whether the information would have been offered to the Board." Without deciding the question, we should note that the district court's decision finds support in several other district court cases. *Cessna Aircraft Co.* v. *NLRB*, 90 LRRM 3339, 3340 (D. Kan. 1975); *Deering Milliken, Inc.* v. *Nash*, 90 LRRM 3138, 3144-45 (D.S.C. 1975); *Climax Molybdenum Co.* v. *NLRB*, 90 LRRM 3126, 3127 (D. Col. 1975). *See also NLRB* v. *Hardeman Garment Co.*, No. C-75-148 (W.D. Tenn. Jan. 15, 1976); *Local 30, United Slate, Tile and Composition Roofers* v. *NLRB*, No. 76-184 (E.D. Pa. Feb. 11, 1976); *Mylan Pharmaceuticals, Inc.* v. *NLRB*, No. 76-79 (W.D. Pa. Jan. 28, 1976).

The Board argues that Exemption 7(A) continues the prior law with respect to the disclosure of investigatory records in "open" cases, in other words, that any disclosure of information as to a *pending* enforcement proceeding would constitute interference with that proceeding. In *Wellman Industries, Inc.* v. *NLRB*, 490 F.2d 427, 430-31 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974), the Fourth Circuit relied on both H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), and S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965), to support the conclusion that, prior to the 1974 amendments, the statute did not permit disclosure of statements compiled as ongoing investigative material in connection with pending unfair labor practice proceedings. *See also Wellford* v. *Hardin*, 444 F.2d 21, 23 (4th Cir. 1971) (purpose of exemption "to prevent premature discovery by a defendant in an enforcement proceeding"). *Cf. Williams* v. *IRS*, 345 F. Supp. 591, 594 (D. Del. 1972), *aff'd per curiam*, 479 F.2d 317 (3d Cir.), *cert. denied*, 414 U.S. 1024 1973). This reading—that Exemption 7(A) requires nondisclosure in any pending enforcement proceeding—finds additional support in some of Senator Hart's language in connection with the introduction of his amendment before Congress in 1974. Senator Hart stated that the original

purpose of Congress in enacting the seventh exemption to FOIA in 1966 had been "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have." Sourcebook at 332. Senator Hart pointed out that

> [r]ecently, the courts have interpreted the seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes—a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.

Id. That, he went on to suggest, was "not consistent with the intent of Congress when it passed this basic act in 1966." *Id.* at 333. Senator Hart's amendment was suggested by the Administrative Law Section of the American Bar Association following upon the report of the Committee on Federal Legislation of the Association of the Bar of the City of New York, which had criticized specifically the Second Circuit decision in *Frankel* v. *SEC*, *supra*. The Association of the Bar's Committee Report pointed out that *Frankel* held that investigatory files are exempt from disclosure forever, but that "other jurists" had "reached the conclusion that Exemption 7 was intended only to protect against premature disclosure in a pending investigation, and that once the investigation is completed and all reasonably foreseeable administrative and judicial proceedings concluded, the files must be disclosed." [12] Source-

12 Senator Hart's remarks before Congress elaborated further his position on this portion of the 1974 amendments:

> Let me clarify the instances in which nondisclosure would obtain: First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding.

Sourcebook at 333.

book at 334. It was with this particular problem of unavailability of closed files in mind that the 1974 amendments to Exemption 7 were adopted.

But appellee argues not without force, and the district court held, that it is not enough to defeat disclosure merely to assert that an enforcement proceeding is pending and that the material has been gathered in connection with that proceeding; rather the exemption must be read complementarily to the *in camera* inspection amendment, 5 U.S.C. § 552(a)(4)(B), and the Board must show to the satisfaction of the court that there would be interference with the particular proceeding for which the investigative materials were gathered, a showing which the district court found was not made here. The Board asserts contrarily that there would necessarily be interference both with the pending charge and with the Board's ability to investigate other charges in three ways: first, suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; second, employees who are interviewed may be reluctant, for fear of incurring employer displeasure, to have it known that they have given information, *see Surprenant Manufacturing Co.* v. *NLRB*, 341 F.2d 756, 763 (6th Cir. 1965), or union officials might not want to volunteer in-

formation for fear of compromising the union's position in negotiations and, third, because these affidavits constitute attorney "work product," revealing investigative and prosecutorial strategy.

We feel it unnecessary to make the broad determination that any investigative information obtained in connection with a pending enforcement proceeding is per se nondisclosable. But we do think that if statements obtained by the NLRB from employees, or their representatives, in connection with unfair labor practice proceedings against an employer were required to be disclosed, interference with the proceedings could well result in the first two ways suggested by the Board. Absent a clearer indication of contrary congressional intent, we are not prepared to hold that disclosure may be required under the FOIA in connection with an ongoing unfair labor practice enforcement proceeding. There is a very large body of law, alluded to only the other day in our *NLRB* v. *Martin A. Gleason, Inc.*, Nos. 75-4018, -4045 and -4047 (2d Cir. Mar. 3, 1976), slip op. 2241, 2266, and exemplified in our *Henry L. Siegel Co.* v. *NLRB*, 328 F.2d 25, 27 (2d Cir. 1964), that an empoyer request to an employee for his statement may, although it does not invariably, result in employee coercion and an interference with the employee's Section 7 rights under the National Labor Relations Act, 29 U.S.C. § 157. Referring to this law, the *Gleason* panel noted that the courts

> have been generous in supporting denials of requests for such pre-hearing statements for a wide variety of specific reasons, e.g., fear, coercion, a fishing expedition by the employer, no valid interest in employer to make the inquiry, and similar factors which militate against the probability that the employees' response to the request can be completely free and voluntary . . . .

Id. at 2266. The *Gleason* opinion also referred to *NLRB* v. *Interboro Contractors, Inc., supra*, and *NLRB* v. *Lizdale Knitting Mills, Inc.*, 523 F.2d 978 (2d Cir. 1975), where we reaffirmed that parties before the Board were not entitled, under statutory or constitutional law, to the discovery procedures provided by the federal rules, but that granting of discovery was within the discretion of the trial examiner "in order to provide the safeguards designed to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." Slip op. at 2271.[13]

We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings.[14] It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended. The cases that Ex-

13 *But see* note 7 *supra*.

14 Other cases which have so held include *Atlas Industries, Inc.* v. *NLRB*, No. C76-27 (N.D. Ohio Feb. 12, 1976); *Jamco International, Inc.* v. *NLRB*, No. 76-C-3 (N.D. Okla. Feb. 11, 1976); *Capital Cities Communications, Inc.* v. *NLRB*, No. C-75-2352 (N.D. Cal. Feb. 8, 1976); *Harvey's Wagon Wheel, Inc.* v. *NLRB*, No. C-76-2487 SAW (N.D. Cal. Feb. 5, 1976); *Mylan Pharmaceuticals, Inc.* v. *NLRB*, No. 76-79 (W.D. Pa. Jan. 28, 1976); *Climax Molybdenum Co.* v. *NLRB*, 90 LRRM 3126 (D. Col. 1975). *See also Local 30, United Slate, Tile and Composition Workers* v. *NLRB*, No. 76-184 (E.D. Pa. Feb. 11, 1976), slip op. 12-13 (denied where history of violence in connection with § 8(b)(1)(A) violations). Holding to the contrary are *Maremont Corp.* v. *NLRB*, No. Civ-76-0098-T (W.D. Okla. Mar. 3, 1976); *Goodfriend Western Corp.* v. *Fuchs*, No. 76-644-T (D. Mass. Feb. 23, 1976); *Deering-Milliken, Inc.* v. *Nash*, 90 LRRM 3138 (D.S.C. 1975) (back pay proceeding); *Cessna Aircraft Co.* v. *NLRB*, 90 LRRM 3339 (D. Kan. 1975).

emption 7(A) was intended to overrule were for the most part *closed* investigative file cases. As the Attorney General's Memorandum on the 1974 Amendments points out:

> Normally, clause (A) will apply only to investigatory records relating to law enforcement efforts which are still active or in prospect—sometimes administratively characterized as records in an "open" investigatory file . . . .
>
> The meaning of "interfere" depends upon the particular facts. . . . One example of interference when litigation is pending or in prospect is harm to the Government's case through the premature release of information not possessed by known or potential adverse parties.

Sourcebook at 508, 517-18. We think that these remarks are exactly applicable to cases involving pending unfair labor practice proceedings. In light of the delicate relationship which exists between employer and employee, we think that Congress would be very reluctant to change the rather carefully arrived at limitations and proceedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery. In short, while we have been impressed with the appellee's grasp of the FOIA amendments and almost persuaded by its argumentation and that of the district court, we are forced to conclude that statements of employees, and their representatives, obtained in connection with unfair labor practice enforcement proceedings are not subject to disclosure as a result of Exemption 7(A). So saying, we do not intend our comments to apply broadly to administrative contexts other than unfair labor practice enforcement proceedings before the NLRB.

We need add in conclusion only that in view of our disposition of appellant's claim under Exemption 7(A) we find it unnecessary to determine the applicability of Exemption 5 (intra-agency memoranda) to these materials.[15]

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15 Exemption 5 of the FOIA for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5), was left unchanged by the 1974 amendments. Appellant claims that affidavits and statements which result from a Board agent's interviews are part of the "attorney's work product" and hence should be "normally privileged in the civil discovery context" under the broad language of *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154-55 (1975), as well as under Exemption 5 to the FOIA. Judge Gagliardi, however, held that the material requested, consisting solely of statements made in support of the union's charges, does not fall within the scope of the "memorandums or letters" clause of Exemption 5, which he read to include the agency's claim of work-product exemption. He ruled that while Exemption 5 doubtless covers internal communications consisting of advice, recommendations and opinions, as well as other materials incorporating deliberative or policymaking processes, it does not cover purely factual or investigatory reports unless those reports are "inextricably intertwined" with the deliberative or policymaking functions of the agency. *See Soucie* v. *David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971). *See also Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 89 (1973); *Tennessean Newspapers, Inc.* v. *FHA*, 464 F.2d 657, 660 (6th Cir. 1972); *Bristol-Myers Co.* v. *FTC*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). The district court noted that the dichotomy between factual and deliberative material is firmly rooted in the legislative history and policy of the Freedom of Information Act. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1965). The court concluded that the documents sought here are not "memorandums," that they do not summarize or evaluate facts or contain recommendations for agency action based upon facts, and that the statements as a whole lack the deliberative quality associated with intra-agency memoranda and attorney's work product. *See NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 159-60.

Several courts have agreed with Judge Gagliardi on his disposition of the Board's Exemption 5 claim. *See, e.g., Local 30, United Slate, Tile and Composition Roofers* v. *NLRB*, No. 75-184 (E.D. Pa. Feb. 11, 1976), slip op. at 13; *Mylan Pharmaceuticals, Inc.* v. *NLRB*, No. 76-79 (W.D. Pa. Jan. 28, 1976), slip op. at 3 n. 3. *But see Jamco International, Inc.* v. *NLRB*, No. 76-C-3 (N.D. Okla. Feb. 11, 1976), slip op. at 7.

Judgment reversed. The cause is remanded to the district court with instructions to vacate its order staying the appellant's proceedings.

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APPENDIX B

Judgment of the Court of Appeals for the Second Circuit in Case No. 75-6119 Entered April 2, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of April, one thousand nine hundred and seventy-six.

Present:

HON. LEONARD P. MOORE,
HON. JAMES L. OAKES,
HON. THOMAS J. MESKILL,
Circuit Judges.

75-6119

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST Co., a Subsidiary of the TI CORPORATION (OF CALIFORNIA),

Plaintiff-Appellee,

v.

NATIONAL LABOR RELATIONS BOARD,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix B

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. Daniel Fusaro
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

(Opinions and Orders of the District Court in Case No. 75 Civ. 3828, Dated Oct. 10, 1975 and Nov. 18, 1975 as Reported at 407 F.Supp. 498)

The Title Guarantee Company, a Subsidiary of Pioneer National Title Insurance Company, a Subsidiary of Title Insurance and Trust Company, a Subsidiary of the TI Corporation (of California),

Plaintiff,

v.

National Labor Relations Board,

Defendant.

No. 75 Civ. 3828

United States District Court
S. D. New York

Oct. 10, 1975

On Motion for Stay Nov. 28, 1975

Jackson, Lewis, Schnitzler & Krupman, New York City, *for plaintiff;* Robert Lewis, Roger S. Kaplan, New York City, of counsel.

Elliott Moore, Deputy Associate Gen. Counsel, N. L. R. B., Abigail Cooley, Asst. Gen. Counsel for Special Litigation, Washington, D. C., co-counsel, Joseph P. Norelli, Washington, D. C. and Winifred D. Morio, Regional Atty., Region 2, N.L.R.B., New York City, of counsel, *for defendant.*

Appendix C

OPINION

GAGLIARDI, *District Judge:*

I

By this action, the Title Guarantee Company ("Title Guarantee") seeks to compel the National Labor Relations Board (the "Board" or "N.L.R.B.") to produce for inspection and copying, pursuant to the Freedom of Information Act, as amended (the "Act"), 5 U.S.C. § 552, certain materials relating to an unfair labor practice charge against Title Guarantee. Plaintiff also seeks preliminary relief restraining the Board from conducting its administrative hearings until the issues herein have been resolved and, should disclosure be ordered, a stay of the administrative proceedings until a reasonable time after such disclosure.

The defendant has moved to dismiss the complaint for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6), or, in the alternative, for summary judgment under Fed.R.Civ.P. 56(c). According to the Board, the district court is without jurisdiction to enjoin the administrative proceedings and the material is exempt from disclosure under the Act. Title Guarantee has cross-moved for summary judgment.

Counsel for both sides have agreed that there is no material issue of fact in this case. Briefly stated, the factual background is as follows: On May 28, 1975, District 65, Wholesale, Retail, Office and Processing Union, Distributive Workers of America (the "Union"), filed an unfair labor practice charge with the Regional Office of the N.L.R.B. in New York alleging that Title Guarantee had refused to bargain with the Union. National Labor Relations Act §§ 8(a)(1)(3), 29 U.S.C. §§ 158(a)(1), (3). Amended

Appendix C

charges were filed alleging, in addition, refusal to bargain in violation of § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5). On June 30, 1975, after investigation by the Regional Office, the Regional Director issued a complaint charging violations as alleged by the Union. Hearings were ultimately set for October 14, 1975.

In July, 1975, Title Guarantee requested that "copies of all written statements, signed or unsigned, contained in the Board's case file . . . be made available for inspection and copying" and that "any such statements taken subsequently also be made available." Primarily, Title Guarantee is interested in receiving written reports or signed affidavits which resulted from Board interviews of witnesses offered by the charging party. *See* N.L.R.B. Field Manual §§ 10056.2, 10056.5; 29 C.F.R. § 101.4. The Regional Director denied the request citing Exemptions 5 and 7(A), 7(C), and 7(D) of the Act, 5 U.S.C. § 552(b)(5), 7(A), 7(C), 7(D). On August 1, 1975 the General Counsel of the Board denied Title Guarantee's appeal for substantially the same reasons cited by the Regional Director. The instant action was then instituted and *in camera* inspection of the material in question was conducted by the court. 5 U.S.C. § 552(a)(4)(B).

II

[1] At the outset, it is important to determine the jurisdictional aspects of this matter. As noted, plaintiff seeks both an order compelling disclosure and an injunction barring any administrative hearings until disclosure is made with respect to the request to compel disclosure, it is unassailable that this court has jurisdiction at this time to order the production of documents under the Freedom of Information Act. 5 U.S.C. § 552(a)(4) provides that:

> [o]n complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

As the Court held in a similar situation in *Cessna Aircraft Co.* v. *N.L.R.B.*, 405 F.Supp. 1042, 1046 (D.Kan. 1975):

> this is not an action to review decisions of the Board regarding discovery matters which may or may not arise during the hearing in controversy now before that Board. This is a separate and distinct action to enforce provisions of the Freedom of Information Act, whose benefits are available "to any person". The Board cannot seriously contend that it is somehow exempt from provisions of the Act, or that its internal rules and regulations regarding discovery may apply to nullify provisions of that Act, or that plaintiff here, simply because it is engaged in litigation before the Board, is relegated to lesser status than general members of the public who may seek information pursuant to provisions of the Act.

This court concludes, therefore, that it has jurisdiction to entertain plaintiff's action to order the agency to produce the material in question.

With regard to the court's injunctive powers, the N.L.R.B., cites *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974), and *Sears, Roebuck & Co.* v. *N.L.R.B.*, 153 U.S.App.D.C. 380, 473 F.2d 91 (1972), *cert. denied*, 415 U.S. 950, 94 S.Ct. 1474, 39 L.Ed.2d 566 (1974) for the proposition that the "Freedom of Information Act does not empower this court

to enjoin Board proceedings." This reliance is misplaced. In *Bannercraft*, the Supreme Court wrote that

> [w]ith the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court.

415 U.S. at 20, 94 S.Ct. at 1038. What *Bannercraft* held was that, although the Court believed that the district court had jurisdiction to enjoin an administrative proceeding, in "a *renegotiation* case," the "nature of the . . . process" was such that plaintiff would not suffer irreparable harm if negotiations continued pending resolution of the Freedom of Information claim. 415 U.S. at 20, 94 S.Ct. at 1028 (emphasis original).

Similarly, in *Sears*, contrary to defendant's interpretation, the District of Columbia Circuit noted that

> the District Court was correct in its premise that there is jurisdiction to enjoin agency proceedings pending resolution of a Freedom of Information Act claim.

473 F.2d at 93. The Court held only that under the peculiar circumstances of that case, the Board having issued a complaint at Sears' own request, Sears had made no showing of irreparable harm.

In the instant case, "with the express vesting of equitable jurisdiction in the district court" by the Act, *Bannercraft, supra*, this court holds that it has jurisdiction to enjoin the Board's proceedings.

III

[2] Turning to the merits, Exemption 5, which is relied upon by the defendant, covers "inter-agency or intra-

agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). According to the Board, the scope of this exemption is parallel to that of the privilege doctrine in the civil discovery context. Thus, it claims, the material in question here is not subject to disclosure as it falls within the purview of the "government's executive privilege," *see E.P.A.* v. *Mink*, 410 U.S. 73, 86, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), and the "attorney work-product privilege," *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

Defendant's contentions are supported by broad language in the recent decision of *N.L.R.B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975). There, the Court was concerned with certain memorandum prepared by the Office of the General Counsel of the N.L.R.B. explaining decisions of that agency to file or not to file a complaint after unfair labor practice charges had been lodged with the Board by a union or employer. The Court held that decisions not to file a complaint were "final opinions" and therefore not exempt under Exemption 5 of the Act. On the other hand, decisions to file a complaint only commenced the litigation process and were exempt.

In the course of its decision, the Court took the opportunity to review much of the background and policy of Exemption 5. The Court noted that:

> Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency. *EPA* v. *Mink*, 410 U.S. at 85-86 [93 S.Ct. 827 at 835-836]. Since virtually any document not privileged may be discovered by the appropriate litigant, if it is relevant to his litigation;

> and since the Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein, . . . it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context.

421 U.S. at 148-49, 95 S.Ct. at 1515 (citations omitted). More specifically, the Court wrote that "it is clear" "that Congress had the Government's executive privilege specifically in mind in adopting Exemption 5," *Id.* at 150, 95 S.Ct. at 1516, and "that it is equally clear that Congress had the attorney work product privilege specifically in mind when it adopted (this) Exemption . . .," *Id.* at 154, 95 S.Ct. at 1518.

This court does not believe that *N.L.R.B.* v. *Sears* is dispositive of the issue at hand. In *Sears*, as noted, the subject matter in question included memoranda designed to circulate among the various departments of the National Labor Relations Board. These memoranda clearly fell within the category envisioned by Congress through its use of the phrase "inter-agency or intra-agency memorandums or letters." The issue before the Court was the scope of the exemption accorded to this category of materials. Phrased in terms of the statute, the issue was the meaning of the second phrase of Exemption 5—"which would not be available by law to a party other than an agency in litigation with the agency." It was for the purpose of this latter inquiry that the Court looked to the civil discovery rules and analogous guidance.

In the case at bar, however, the material requested consists solely of statements made in support of the Union's charges. *See* 29 C.F.R. § 101.4. This material does not fall

within the scope of the "memorandums or letters" exemption of Exemption 5. Whatever broad language exists in *Sears* or other cases, *e.g., E.P.A.* v. *Mink, supra,* equating Exemption 5 to civil discovery privileges was enunciated in the context of "inter-agency or intra-agency memorandums or letters" or "memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." *Sears, supra* at 154, 95 S.Ct. at 1518. This court does not believe that such statements should be applied to carry Exemption 5 to the type of witness statements in question here.

This decision is not based on a purely mechanical interpretation of the statutory language. The cases have uniformly held that Exemption 5 is not to be construed to include documents consisting essentially of factual material. As the Supreme Court wrote in *E.P.A.* v. *Mink, supra* 410 U.S. at 89, 93 S.Ct. at 837:

> [v]irtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.

Or, as the District of Columbia Circuit has said, the exemption covers

> internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports.

Soucie v. *David,* 145 U.S.App.D.C. 144, 448 F.2d 1067, 1077 (1971). *See also Tennessean Newspapers, Inc.* v. *F.H.A.,*

464 F.2d 657, 660 (6th Cir. 1972); *Bristol-Myers Co.* v. *F.T.C.,* 138 U.S.App.D.C. 22, 424 F.2d 935, 939 (1970); *Philadelphia Newspapers, Inc.* v. *Department of H.U.D.,* 343 F.Supp. 1176, 1178 (E.D.Pa. 1972); *M. A. Shapiro & Co.* v. *S.E.C.,* 339 F.Supp. 467, 470 (D.D.C.1972); *Consumers Union of United States, Inc.* v. *Veterans Administration,* 301 F.Supp. 796, 803 (S.D.N.Y.1969).

This distinction is firmly rooted in the legislative history and policy of the Freedom of Information Act. In explaining the exemption, the Senate Committee wrote that it was in response to comments which pointed out that "it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny." S.Rep.No.813 on S. 1160, 89th Cong., 1st Sess. (1965). Similarly, the House Report considered the policy of the exemption as being to eliminate the inhibition of a free and frank exchange of opinions and recommendations among government personnel which could result from routine disclosure of their internal communications. H.R.Rep.No.1497, 89th Cong., 2d Sess., at 10 (1966). *See also Ackerley* v. *Ley,* 137 U.S.App.D.C. 133, 420 F.2d 1336, 1341 (1969). These considerations are not present in the instant situation.

Brockway v. *Department of the Air Force,* 518 F.2d 1184 (8th Cir. 1975) which disapproved of the emphasis on the deliberative nature of a document in determining the application of Exemption 5 to such a document does not require a contrary result. *Brockway* dealt with statements of Air Force personnel concerning an accident involving the Department's aircraft. In that case the statements, although factual in nature, were of use in the Department's future planning. Consequently, the Eighth Circuit held that:

> [o]n the narrow facts of this case we believe that the deliberative processes of the Air Force in establishing appropriate safety policies will be best protected by permitting these witness statements to be exempted from disclosure.

Id. at 1194.

For these reasons, this court holds that Exemption 5 does not cover the statements of witnesses taken by the Board in connection with the unfair labor practice charge against Title Guarantee.

IV

The defendant also relies on Exemptions 7(A), 7(C) and 7(D) which provide that the Act does not apply to "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would:

> (A) interfere with enforcement proceedings . . .
>
> (C) constitute an unwarranted invasion of personal privacy, (or)
>
> (D) disclose the identity of a confidential source . . ."

5 U.S.C. § 552(b)(7)(A), 7(C), 7(D).

In discussing the application of this exemption to the instant case, it will be helpful to review the history of the investigatory materials exemption. As originally enacted this provision exempted

> investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

5 U.S.C. § 552(b)(7) (1967). The legislative history of this broad language indicates—and plaintiff appears to concede this—that under the original version of Exemption 7, virtually any material compiled in the course of an investigation would be withheld from disclosure. H.R. Rep.No. 1497, 89th Cong., 2d Sess. 11 (1966); S.Rep.No.813, 89th Cong., 1st Sess. 9 (1965). Thus, in *Wellman Industries Inc.* v. *N.L.R.B.*, 490 F.2d 427 (4th Cir. 1974), the Court held that affidavits obtained by an N.L.R.B. investigator during his inquiry into Union objections to a representation election were not discoverable under the Act as the Exemption was designed to "prevent premature disclosure of an investigation so that the Board can present its strongest case . . ." *Id.* at 431 citing *Wellford* v. *Hardin*, 444 F.2d 21 (4th Cir. 1971). *See also Barceloneta Shoe-Corp.* v. *Compton*, 271 F.Supp. 591 (D.P.R.1970); *Clement Bros., Inc.* v. *N.L.R.B.*, 282 F.Supp. 540 (N.D.Ga.1968).

In 1974, however, the Act was amended, substantially changing the provisions of Exemption 7. Defendant, itself, concedes that the purpose of the amendments, as evidenced by the legislative history, was to limit the exemption to instances where disclosure would interfere with one of a specific set of interests. The amendment requires that the government "specify some harm in order to claim the exemption" and does not "afford . . . all law enforcement matters a blanket exemption." 120 Cong.Rec. H10868 (Remarks of Congressman Reed of New York) (daily ed. Nov. 20, 1974). In enacting the amendment exception, the Congress was concerned with the sweeping exemptions afforded by some court decisions, *see, e.g., Center for National Policy Review* v. *Weinberger*, 163 U.S.App.D.C. 368, 502 F.2d 370 (1974), and saw the amended exemption as narrowing the body of material which would be withheld. 120 Cong.

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Rec. S9331 (Remarks of Senator Kennedy) (daily ed. May 30, 1974). *See also* 120 Cong.Rec. S9330 (Remarks of Senator Hart) (daily ed. May 30, 1974).

In light of this history, and from the language of the amendment as well, it is clear that the courts must examine each situation individually and determine if any of the specific harms enumerated by the statute would result from disclosure. If the government does not satisfy its statutory burden of proof, 5 U.S.C. § 552(a)(4)(B), that some such particular harm exists, the "general philosophy of full agency disclosure," *N.L.R.B.* v. *Sears, Roebuck & Co., supra* at 136, 95 S.Ct. at 1509, must prevail and the material be disclosed.

Defendant contends that disclosure of the material in question would "interfere with enforcement proceedings" by harming the Government's case in administrative and/or judicial proceedings, cutting off information from members of the public who would be reluctant to volunteer information if they knew their names or the information would be revealed, and stifling effective trial preparation which is protected by the attorney's work product privilege. The legislative history indicates, however, that these general contentions are insufficient under the amended exemption. The relevant explanation of this Exemption states that it:

> would apply whenever the Government's case in court —a concrete prospective law enforcement proceeding— would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding.

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120 Cong.Rec. S9329 (Remarks of Senator Hart) (daily ed. May 30, 1974). In this case, none of the specific types of interference has been shown. The Court has reviewed the material in question and concludes that release of the information would not block further information of the same type from similar sources nor would it stifle effective preparation of the case. In addition, it does not appear that the specific enforcement proceeding would be harmed. Whatever value Title Guarantee may gain from the information sought will not be based on the timing of such release but rather on its determination of whether any material contained in the released documents supports its contentions. *See N.L. R.B.* v. *Schill Steel Products, Inc.*, 408 F.2d 803, 805 (5th Cir. 1969). This value is precisely that which is contemplated by the Freedom of Information Act and is not restricted by the exemptions to the Act.

Defendant's further contention that the documents would constitute an unwarranted invasion of personal privacy seems to hinge on a rather wide interpretation of Exemption 7(C). According to the defendant, the right to privacy here includes the "right to select the people to whom . . . (one) will communicate his ideas." The court does not agree. The cases applying Exemption 7(C) are generally concerned with items which are much more commonly thought of as private. *See, e. g., Rural Housing Alliance* v. *U. S. Department of Agriculture*, 162 U.S.App.D.C. 122,

498 F.2d 73 (1974) (information concerning marital status, legitimacy of children, identity of fathers of children, medical conditions, welfare payments, alcoholic consumption, family fights); *Wine Hobby U.S.A.* v. *I.R.S.*, 502 F.2d 133 (3d Cir. 1974) (home address, family status); *Ackerley* v. *Ley*, 137 U.S.App.D.C. 133, 420 F.2d 1336 (1969) (medical files); *Ditlow* v. *Schultz*, 379 F.Supp. 326 (D.D.C. 1974) (travel history). The court has examined the material in question and has found no personal matters which should be protected under Exemption 7(C).

With regard to defendant's final contention that disclosure would reveal the identity of a confidential source, the Court notes that the Conference Report accompanying the final version of the bill which created Exemption 7(D), states that the term "confidential source" was employed

> to make clear that the identity of a person . . . may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.

S.Rep.No.93-1200, 93d Cong., 2d Sess. 13, U.S.Code Cong. & Admin.News, p. 6291 (1974). In the present situation, defendant has not presented any evidence that the material which is sought was elicited after an express assurance of confidentiality. In such a case, it is reasonable to infer that no such assurance was made, and, in any event, the burden of demonstrating such an assurance is on the government. 5 U.S.C. § 552(a)(4)(B). Thus, the crucial inquiry is whether it is reasonable to infer that the statements were made under some understanding on the part of the deponent that his statements would be confidential.

The court has reviewed the material and concludes that no such inference is reasonable. The nature of the material as well as the identity of the deponents indicates that an understanding of confidentiality or lack of it would be entirely irrelevant to whether the information would have been offered to the Board.

Accordingly, the Board's motion to dismiss the complaint, or, in the alternative, for summary judgment, is denied. Plaintiff's motion for summary judgment is granted to the extent that the Board is directed to turn over the material sought by the plaintiff for inspection and copying forthwith. It appears that if the material is disclosed forthwith, Title Guarantee will have adequate time to review these documents prior to the scheduled hearings. The court finds that, unlike the renegotiation procedure in *Bannercraft*, the nature of an unfair labor practice proceeding is such that plaintiff will be irreparably harmed if the material is not disclosed prior to those hearings. Therefore, should the material not be made available to Title Guarantee in advance of the administrative hearings, the Board is enjoined from conducting any hearings in this matter until such time as it complies with this decision.

So ordered.

ON MOTION FOR STAY

The National Labor Relations Board ("N.L.R.B." or the "Board") has moved pursuant to Fed.R.Civ.P. 62(c) for a stay of the order of this court issued on October 10, 1975 directing the N.L.R.B. to turn over forthwith, pursuant to the Freedom of Information Act, as amended ("the Act"), 5 U.S.C. § 552, certain material sought by the plaintiff, and enjoining the Board from conducting an unfair labor prac-

tice hearing pending compliance with that order. The N.L.R.B. has not complied with this court's order.

In support of its motion, the N.L.R.B. contends that: 1) it is likely to prevail on the merits of its appeal of this court's order; 2) it will suffer irreparable injury if a stay is not granted; 3) plaintiff will suffer no substantial harm as a result of the granting of a stay; and 4) a stay would serve the public interest.

With regard to the merits of the case, the N.L.R.B. contends—as it did in its original opposition to the relief sought by the plaintiff—that the material in question is exempt from disclosure under Exemptions 5 and 7 of the Act, 5 U.S.C. § 552(b)(5), (7), and that this court is without power to enjoin the Board's proceedings pending compliance with this court's order. Specifically, the N.L.R.B. reasserts that *N.L.R.B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), and *Brockway* v. *Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975), stand for the proposition that the material is not subject to disclosure under Exemption 5. It also claims that *Wellman Industries, Inc.* v. *N.L.R.B.*, 490 F.2d 427 (4th Cir. 1974), and several cases in districts outside of this Circuit are authority for the proposition that affidavits obtained in connection with unfair labor proceedings are exempt from disclosure under Exemption 7. Finally, the N.L.R.B. contends that under the doctrine of exhaustion of administrative remedies, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938), as applied to Freedom of Information Act cases, *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974); *Sears, Roebuck & Co.* v. *N.L.R.B.*, 153 U.S.App.D.C. 380, 473 F.2d 91 (1972),

cert. denied, 415 U.S. 950, 94 S.Ct. 1474, 39 L.Ed.2d 566 (1974), this court is without power to enjoin the Board's proceedings pending compliance with the court's order.

Each of these contentions has been dealt with fully in the original opinion ordering disclosure of the material in question and will be reviewed only briefly.

For the reasons stated in the original opinion the court adheres to its decision that the material in question is not exempt from disclosure under the Act. *N.L.R.B.* v. *Sears, supra*, dealt with materials which reflected "deliberative or policy-making processes," *E.P.A.* v. *Mink*, 410 U.S. 73, 89, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973); *Soucie* v. *David*, 145 U.S.App.D.C. 144, 448 F.2d 1067, 1077 (1971), and as such, these materials were covered by Exemption 5. *Brockway* v. *Air Force, supra*, similarly was limited to a case where "the deliberative processes of the Air Force . . . (would be) best protected by permitting . . . (the material sought) to be exempted from disclosure." *Id.* at 1194. In this case, plaintiff is seeking disclosure of purely factual materials which are not covered by Exemption 5. *E.P.A.* v. *Mink, supra.*

The cases relied upon by the defendant in connection with Exemption 7 were all decided prior to the recent amendments of the Act and are simply not in point. The amended Exemption 7, rather than representing the codification of the pre-amendment case law—as the Board contends—was the result of Congressional dissatisfaction with the application of the Act, 120 Cong.Rec. H10868 (Nov. 20, 1974); 120 Cong.Rec. S9330-31 (May 30, 1974), and was designed to narrow the exemption. *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 8 (1975). Exemption 7 as it currently stands requires that material be disclosed unless it can be

shown that one of a specific set of harms would result from disclosure.[1] The court has conducted *in camera* examination of the material in question and has determined that none of these harms would be forthcoming from disclosure of the specific materials at issue here. Moreover, the N.L.R.B. has clearly not satisfied its statutory burden of proof, 5 U.S.C. §552(a)(4)(B), in this regard.

With respect to the injunctive powers of this court, the court adheres to its original decision that "there is jurisdiction to enjoin agency proceedings pending resolution of a Freedom of Information Act claim." *Sears, Roe-Buck & Co.* v. *N.L.R.B., supra,* at 93. The doctrine of exhaustion of administrative remedies, *Myers* v. *Bethlehem Shipbuilding Corp., supra,* applies where "the administrative remedy is as likely as the judicial remedy to provide the wanted relief." K. C. Davis, *Administrative Law* § 20.01 at 56 (1958). "No court requires exhaustion where exhaustion will involve irreparable injury." *Id.* Here, the plaintiff has exhausted the available administrative channels and has been denied access to the requested material.[2] If

[1] Once it is determined that a request pertains to "investigatory records compiled for law enforcement purposes," the next question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended exemption 7. If not, the material must be released despite its character as an investigatory record compiled for law enforcement purposes, and (generally speaking) even when the requester is currently involved in civil or criminal proceedings with the Government.

Attorney General's Memorandum, supra at 6-7.

[2] Indeed, the Acting Chief Administrative Law Judge of the N.L.R.B. wrote in his order denying disclosure

> If having exhausted . . . (the Board's own Freedom of Information Act procedures, 29 C.F.R. §102.17, Title Guarantee) is of the opinion that the statements referred to in its Notice to Produce have been improperly withheld by the Board's General Counsel under the Freedom of Information Act, its recourse under that Act is to an appropriate United States District Court, as provided for in 5 U.S.C. 552(a)(3) . . . .

Title Guarantee Company and District 65, No. 2-CA-13745, N.L.R.B. Division of Judges (D.C. September 9, 1975) at 2.

the unfair labor proceeding continues and plaintiff does not prevail in that matter because of a lack of opportunity to adequately prepare, it is hardly likely that any judicial review would ever undo the harm.

Moreover, in the present case the court has determined after *in camera* inspection that plaintiff would not require a substantial period of time to review the material and adequately prepare for the Board proceedings. Had the N.L.R.B. complied with this court's original order there would have been no need for a postponement of the Board proceedings. The N.L.R.B. has chosen, however, not to comply with the disclosure order and seeks to continue its administrative proceeding without giving the plaintiff the benefit of review of material which this court has determined it is entitled to under the Act. "With the express vesting of equitable jurisdiction in the district court by . . . (the Act), ["] *Renegotiation Board* v. *Bannercraft Clothing Co., supra* 415 U.S. at 20, 94 S.Ct. at 1038, this court will utilize its inherent powers as an equity court, *cf., id.,* to bar such obviously inequitable procedures.

The defendant relies on *Renegotiation Board* v. *Bannercraft, supra,* for the proposition that injunctions against administrative proceedings pending ultimate resolution of Freedom of Information Act controversies will not be issued.[3] In truth, *Bannercraft* supports the issuance of an

[3] *Bannercraft* and all of the other cases cited by the parties and discussed herein deal with the question of preliminary injunctive

injunction in the instant case. *Bannercraft* was specifically limited by the Court to negotiation situations where discussions could reasonably continue while an action was pending in litigation. 415 U.S. at 20, 94 S.Ct. at 1028. Here, however, unlike *Bannercraft*, plaintiff is threatened with an impending unfair labor proceeding. *De novo* review of such a proceeding is unavailable. 29 U.S.C. §§ 10(e), 160(e); *Universal Camera Co.* v. *N.L.R.B.*, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951). *Compare* 5 U.S.C. Sup. § 1218; *Renegotiation Board* v. *Bannercraft, supra* 415 U.S. at 23, 94 S.Ct. 1028 (*de novo* review available from Renegotiation Board decision). To deny plaintiff the opportunity to review the requested material prior to the hearing might effectively foreclose any value in the disclosure ordered by this court. This is precisely the type of situation in which *Bannercraft* implies that injunctive relief would be proper and in which the district courts have granted such relief. *Cessna Aircraft Co.* v. *N.L.R.B.*, 405 F.Supp. 1042 (D.Kan., 1975).

The curious aspect of defendant's present motion is that the Board itself has asserted that the exemptions to the Act parallel the discovery rules in the civil litigation context. The defendant cannot, then, reverse itself and claim that "discovery" of the material in question should be made subsequent to the completion of an administrative hearing. Title Guarantee has sought this material in the discovery context for the purpose of preparation for an

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relief pending resolution of Freedom of Information claims. Here, this court has determined that plaintiff is entitled to summary judgment on the merits and the equitable considerations weigh commensurately more heavily in plaintiff's favor.

unfair labor proceeding.[4] While it is clear that the rights accorded under the Act are not limited to litigants in an adversary proceeding, *N.L.R.B.* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 149, 95 S.Ct. 1504, it is equally clear that the fact that a plaintiff is in an adversary position should not compromise his rights under the Act. *See* S.Rep.No.813, 85th Cong., 1st Sess. at 7. This court has determined that disclosure is required and the court believes that if the policy of the Act is to have any real value, the plaintiff is entitled to his discovery prior to the administrative action.

The Board's other contentions can be dealt with summarily. For the reasons stated herein and in the original opinion this court believes that plaintiff will suffer irreparable harm if a stay of this court's order is granted. On the other hand, defendant has not demonstrated any harm in delaying the administrative proceeding until appellate review of the Freedom of Information claim is completed.

With regard to the public interest question, it is well-established that the Freedom of Information Act was enacted in order to ensure a "general philosophy of full agency disclosure." *N.L.R.B.* v. *Sears, Roebuck & Co., supra* at 136, 95 S.Ct. at 1504, 1509, which would "secure . . . information from possibly unwilling official hands." *E.P.A.* v. *Mink, supra* 410 U.S. at 80, 93 S.Ct. at 832. The Board, by its present motion, is seeking to enjoy the fruits of an unfa[illegible] labor proceeding while refusing to comply with this court's order and to effectuate the "broadly con-

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[4] The need for improved discovery procedures in connection with unfair labor practice proceedings has recently been underscored by a report of the New York County Lawyer's Association, N.Y.L.J., Nov. 19, 1975, p. 1, col. 2; p. 2 col. 5.

ceived . . . public right," *id.*, accorded by the Act. If the N.L.R.B.'s proceedings were to continue without disclosure of the material in question, not only the teeth but the very breath of the act would be taken out.

Accordingly, defendant's motion for a stay of this court's order dated October 10, 1975 directing defendants to make available forthwith the material sought by the plaintiff and enjoining the N.L.R.B. proceedings should the Board choose not to disclose the material requested by the plaintiffs is denied.

So Ordered.

APPENDIX D

Statutes, Regulations and Other Authorities

Excerpts From The Freedom Of Information Act, as Amended in 1974

By P. L. 93-502, 88 Stat. 1561

Title 5, United States Code

§552. Public Information; agency rules, opinions, orders, records and proceedings.

(a) Each agency shall make available to the public information as follows:

• • •

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) • • •

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter *de novo,* and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall

be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

* * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with that agency;

* * *

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, * * * (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security investigation, confidential information furnished only by the confidential source;

* * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include——

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly with-

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holding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

• • •

Excerpts From The Freedom Of Information Act of 1967

P.L. 90-23, 81 Stat. 54

Title 5, United States Code

§552. Public Information; agency rules, opinions, orders, records, and proceedings.

• • •

(b) This section does not apply to matters that are—

• • •

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

• • •

Excerpts From The National Labor Relations Act as Amended, 29 U.S.C. §§ 151, et seq.

• • •

Rights Of Employees

Sec. 7. Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain

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collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

• • •

Unfair Labor Practices

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in section 7;

• • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

• • •

Excerpts From The N.L.R.B. Rules & Regulations, Series 8, as Amended, 29 C.F.R. §§ 102, et seq.

SUBPART K—RECORDS AND INFORMATION

Freedom of Information Regulations

Sec. 102.117 Board materials and formal documents available for public inspection and copying; requests for identifiable records; files and records not subject to inspection; fees for copying and production; access to and amendments of records pertaining to individuals in systems of records.

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(a)(1) The following materials are available to the public for inspection and copying during normal business hours: (i) All final opinions and orders made in the adjudication of cases; (ii) administrative staff manuals and instructions that affect any member of the public (excepting those establishing internal operating rules, guidelines, and procedures for the investigation, trial, and settlement of cases); (iii) a record of the final votes of each member of the Board in every agency proceeding; and (iv) a current index of final opinions and orders made in the adjudication of cases.

• • •

(c)(1) Requests for the inspection and copying of records other than those specified in paragraphs (a) and (b) of this section must be in writing and must reasonably describe the record in a manner to permit its identification and location. The envelope and the letter should be clearly marked to indicate that it contains a request for records under the Freedom of Information Act (FOIA). The request must contain a specific statement assuming financial liability in accordance with paragraph (c)(2)(iv) of this section, for the direct costs of the search for the requested records and their duplication.

• • •

(d) Subject to the provisions of §§102.31(c) and 102.66 (c), all files, documents, reports, memoranda, and records of the agency, falling within the exemptions specified in 5 U.S.C. section 552(b), shall not be made available for inspection or copying, unless specifically permitted by the Board, its chairman, or its general counsel.

• • •

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Sec. 102.118 Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum; prohibited from testifying in regard thereto; production of witnesses' statements after direct testimony.

(a)(1) Except as provided in § 102.117 of these rules respecting requests cognizable under the Freedom of Information Act, no regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent of the Board or the chairman of the Board if the document is in Washington, D.C., and in control of the Board; or of the general counsel if the document is in a regional office of the agency or is in Washington, D.C., and in the control of the general counsel. • • •

• • •

(b)(1) Notwithstanding the prohibitions of paragraph (a) of this section, after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the administrative law judge shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has t tified. • • •

• • •

(d) The term "statement" as used in paragraphs (b) and (c) of this section means: (1) a written statement

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made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement. [*33 F.R. 9819, July 9, 1968, as amended at 35 F.R. 10658, July 1, 1970*]

Excerpts From the N.L.R.B. Statements of Procedure, Series 8, as Amended, 29 C.F.R. §§ 101.1, et seq.

• • •

SUBPART B—UNFAIR LABOR PRACTICE CASES UNDER SECTION 10(a) TO (i) OF THE ACT AND TELEGRAPH MERGER ACT CASES

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Sec. 101.4 *Investigation of charges.*—When the charge is received in the regional office it is filed, docketed, and assigned a case number. The regional director may cause a copy of the charge to be served on the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section 10(b) of the act is the exclusive responsibility of the charging party and not of the general counsel or his agents. The regional director requests the person filing the charge to submit promptly evidence in its support. As part of the investigation hereinafter mentioned, the person against whom the charge is filed, hereinafter called the respondent, is asked to submit a statement of his position in respect to the allegations. The case is assigned for investigation to a member of the field staff, who interviews representatives of the parties and other persons who have knowledge as to the charges, as is deemed necessary. In the investigation and in all other stages of the proceedings, charges alleging violation of section 8(b)(4)(A), (B), and (C), charges alleging violation of section 8(b)(4)(D) in which it is deemed appropriate to seek injunctive relief under section 10(1) of the act, and charges alleging violations of section 8(b)(7) or 8(e) are given priority over all other cases in the office in which they are pending except cases of like character; and charges alleging violation of section 8(a)(3) or 8(b)(2) are given priority over all other cases except cases of like character and cases under section 10(1) of the act. The regional director may in his discretion dispense with any portion of the investigation described in this section as appears necessary to him in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest. After investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, or settlement; or, the case may necessitate formal methods of disposition. Some of the informal methods of handling unfair labor practice cases will be stated first.

Appendix D

National Labor Relations Board

Casehandling Manual

(Part One)

Unfair Labor Practice Proceedings
April 1975

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10056 Steps Taken: The steps herein constitute normal procedure and should be followed.

Appendix D

10056.1 Witnesses of Charging Party: As soon as possible, the Board agent should arrange to interview witnesses of the charging party.

The initial letter to the charging party has requested a "story" of what happened. The contact should be made whether or not an answer to the initial letter has been received. If it has not been received, the Board agent at the time of the contact should remind the charging party of this fact and should insist upon prompt receipt regardless of the fact that interview arrangements are being made. The burden of having witnesses available at a date which is the earliest available to the Board agent should be placed on the charging party. (But see 10056.3.)

The charging party should be ready to submit *his* proof of what he charges or have a good reason for any delay; otherwise, he should withdraw and refile when ready.

Should there be a failure of cooperation in this respect, without reasonable explanation, a withdrawal request should be suggested; and, if necessary, the charge should be dismissed for lack of cooperation.

There are situations, e.g., "stalling" charges, where even more prompt action than that envisaged above will be called for. In appropriate cases and with the supervisor's approval, a "proof deadline" of 72 hours, or less, may be imposed.

10056.2 Interviews of Witnesses of Charging Party: Pursuant to the initial arrangements described above, the Board agent should meet with and interview witnesses offered by the charging party.

Wherever possible, the charging party's case, if one exists, should be established through interviews with the charging

Appendix D

party and with witnesses offered by the charging party. Suggestions may be made by the charging party with respect to other witnesses or sources of information, but these should be adopted only upon a showing of possible advantage therefrom; for example, a suggestion that the Board agent interview a number of named persons, perhaps unfriendly but at least inaccessible to the charging party, should not be undertaken unless the suggestion is fortified by a reasonable explanation of (1) what such persons would say, and (2) how it would be pertinent. It is the responsibility of the Board agent to avoid unnecessary expenditure of time and energy.

10056.3 Pertinent Lines of Inquiry Should Be Exhausted: All promising leads should be followed. It is the responsibility of the Board agent to take steps necessary to ascertain the truth of the allegations of a charge. He should exhaust all lines of *pertinent* inquiry, whether or not they are within the control of, or are suggested by, the charging party. (As indicated earlier, the latter's burden is limited to that of full cooperation within his means.) In close cooperation with the supervisor, the Board agent should take all investigative steps, short of "fishing," in areas reasonably calculated to bring results. Where necessary, the investigative subpoena should be used (*Subpoenas,* 11770-11806). Depositions may not be used in connection with precomplaint investigations (*Depositions,* 10352).

In cases involving postsettlement unfair labor practice allegations, activity prior to a settlement agreement may be considered in assessing a respondent's postsettlement conduct.

10056.4 Obtaining Evidence From the Charged Party: Only when the investigation of the charging parties' evidence

and pertinent leads *point to a prima facie case* should the charged party be contacted to provide evidence. In such cases the procedures of 10056.5 should be followed.

10056.5 Interviews of Respondent's Representatives: Every attempt should be made to interview main representatives (corporate officers, international representatives) of the charged party.

Supervisors at all levels in a CA case and union agents in a CB case should also be interviewed if they possess relevant knowledge. If possible, such statements should be reduced to signed affidavits or at least written form.

Where respondent is represented by counsel or other representative and cooperation is being extended to the Region in connection with its investigation of unfair labor practice charges, the charged party's counsel or representative is to be contacted and afforded an opportunity to be present during the interview of any supervisor or agent whose statements or actions would bind a respondent. This policy will normally apply in circumstances where: (a) the charged party or his counsel or representative is cooperating in the Region's investigation; (b) counsel or representative makes the individual to be interviewed available with reasonable promptness so as not to delay the investigation; and (c) during the interview counsel or representative does not interfere with, hamper, or impede the Board agent's investigation.

This policy does not preclude the Board agent from receiving information from a supervisor or agent of the charged party where the individual comes forward voluntarily, or where the individual specifically indicates that he does not wish to have the charged party's counsel or

representative present. Similarly, in cases involving individuals whose supervisory status is unknown, this policy would not be applicable.

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10058 Techniques

10058.1 In General: In this area, action must fit circumstances. Precise devices for each case must be adopted pursuant to consultation between Board agent and supervisor. The following are offered as guides.

Two factors are worth noting at the outset. (1) The true facts of a situation are more likely to be ascertained if the investigation is made *promptly*, before there has been sufficient time for loss of memory or for deliberate falsification. (2) Of immense value, where they can be obtained, are the *written positions* of all parties.

Ascertainment of the basic facts is best accomplished by private interviews with persons having knowledge of the circumstances and by examination of pertinent records. For purposes of investigation, *joint* conferences of the parties accomplish very little, although they may have some value in voluntary disposition of cases (see Techniques of Settling, 10128), or another possible exception to this rule may exist in the "technical" 8(a)(5) case where factual issues may be narrowed.

10058.2 Affidavits or Statements: The keystone of the investigation is the *affidavit*. Every effort should be made to reduce statements of witnesses, friendly or hostile, to affidavit form. Extreme care should be taken by the Board agent in recording the facts given by witnesses. Wherever possible, witnesses should be interviewed individually and outside the presence of representatives of the party offer-

ing them (10056.5). The Board agent may use his own judgment in the event of difficulties along these lines, but it should be recognized that he can take a firmer position with a charging party (whether an individual, a union, or an employer) than with a charged party, since the cooperation of the former is a basic requirement. Copies of an affidavit should be given, upon request, to the witness signing any such affidavit; copies of affidavits should not be given to persons other than the respective affiants themselves prior to hearing. (For production of affidavits during the hearing, see 10394.7.)

Where efforts to procure a sworn statement have failed, a signed or initialed statement should be sought. Finally, even though swearing and signing are refused, a "first-person" statement should be prepared as part of a memo outlining the circumstances of the interview, the reasons for the interviewee's refusal to swear and/or sign.

Where affidavits or statements have been submitted by non-Board personnel, e.g., by the charging party, the witnesses should be reinterviewed on all pertinent points; they should not be asked merely to reswear to the accuracy of the previously submitted materials.

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10058.5 *Affidavits/Statements Reduced To Writing:* The affidavit or statement should be reduced to writing at an appropriate time during the course of an interview. Now, the witness should understand that the Board agent is memorializing the facts as the witness knows them, and that (if this has not already been done) he will be asked to sign and swear to the truth of what he is saying. Affidavits or statements should be written in the first person.

Although they need not be verbatim, they should, to the degree possible, contain language used by the witness. Opportunity to read and to make (initialed) corrections or additions should be given. Either at the beginning or the ending of the dictated statement, the oath should be formally administered.

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APPENDIX E
ANALYSIS OF F.O.I.A. LITIGATION FOR N.L.R.B. STATEMENTS
1975-1976

CASE NAME & NUMBER (ARRANGED BY JUDICIAL CIRCUIT)	EXEMPTION 7(A) INTERFERENCE WITH ENFORCEMENT PROCEEDINGS		EXEMPTION 7(C) UNWARRANTED INVASION OF PERSONAL PRIVACY		EXEMPTION 7(D) DISCLOSURE OF IDENTITY OF OF CONFIDENTIAL SOURCE		EXEMPTION 5 "MEMORANDUMS & LETTERS"		"BANNERCRAFT" STAY OF N.L.R.B. PROCEDURES PENDING F.O.I.A. DISPOSITION	
	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Injunction Granted	Injunction Denied
FIRST CIRCUIT										
Goodfriend Western Corp. v. Fuchs D. Mass., No. CA 76-644-T: Opinion, March 1, 1976, 92 LRRM 2461; Order, February 23, 1976, 91 LRRM 2454.		X		X		X		X	X	
*(1) Goodfriend Western Corp. v. Fuchs U.S.C.A., No. 76-1116: Opinion, May 6, 1976 (per curiam), ____F.2d___, 92 LRRM 2466.	X		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED	
Farren Memorial Hospital v. Fuchs, D. Mass., Civ. No. 76-674-M Temporary Restraining Order, February 25, 1976; Order, April 26, 1976, 92 LRRM ____, appeal pending, 1st Cir., No. _____.		X		X		X		X	X	

* Numbers appearing in parentheses refer to "Notes to Appendix E" beginning on page 76-1a

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	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
SECOND CIRCUIT										
The Title Guarantee Co. v. NLRB S.D.N.Y. No. 75-Civ.-(LPG): Memorandum Opinion & Order, October 10, 1975, 90 LRRM 2849; Order denying motion for stay pending appeal, November 28, 1975, 90 LRRM 3238.		X		X		X		X		X
The Title Guarantee Co. v. NLRB, 2d Cir., No. 75-6119, April 2, 1976	X		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED	
Barnes & Noble Bookstores v. NLRB S.D.N.Y. No. 76-Civ. 1168 (MP): Oral opinion, March 12, 1976, 92 LRRM 2169, appeal pending, 2d Cir., No. 76-8149.		X		X		X		X		X
(1) NLRB v. Biophysics Systems, Inc., S.D.N.Y., No. M18-304 (RJW): Memorandum opinion & Order, April 12, 1976, 92 LRRM_____	X		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED	

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	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
THIRD CIRCUIT										
(2) Chassen Bakers, Inc. v. NLRB, M.D. Pa., Civ. No. 75-1508: Order, December 12, 1975, 91 LRRM 2345	ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED			X
(2) Roger J. Au & Sons, Inc. v. NLRB, W.D. Pa., Civ. No. 76-027: Memorandum & Order, January 16, 1976, 91 LRRM 2430, appeal pending, 3d Cir., No. 76-1228.	ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED			X
Mylan Pharmaceuticals, Inc. v. NLRB, W.D. Pa., Civ. No. 76-79: Opinion, January 28, 1976, 91 LRRM ____, appeal pending, 3d Cir. No. 76-1285.		X		X		X		X		X

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	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
(3) Local 30, United Slate, Tile & Composition Roofers, Etc. v. NLRB, E.D. Pa., Civ. No. 76-184: Opinion & Order, February 11, 1976, 91 LRRM 2515.	X			X (DICTUM)		X (DICTUM)		X (DICTUM)		NOT ARGUED OR DECIDED
(2) Florsheim Shoe Store Co. v. NLRB, W.D. Pa., Civ. No. 76-257: Order, February 27, 1976, 91 LRRM 2656		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		NOT DECIDED		X
Harowe Servo Controls, Inc. v. NLRB, E.D. Pa., Civ. No. 76-292: Memorandum Opinion & Order, March 25, 1976, 92 LRRM ____; see, Memorandum opinion & order, directing in camera inspection, March 11, 1976, 92 LRRM _____.	X		X		X			NOT DECIDED		X

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	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
FOURTH CIRCUIT										
(4) Deering Milliken, Inc. v. NASH, D.S.C., Civ. No. 75-864: Opinion & Order, November 12, 1975, 90 LRRM 3138, appeal pending, 4th Cir., Nos. 76-1221, 1222.		X		X		X		X	NOT ARGUED OR DECIDED	
(5) Read's Inc. v. NLRB, D. Md., Civ. No. B-76-209; Memorandum & Order, February 17, 1976, 91 LRRM 2722.		X	ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED			X

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	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
FIFTH CIRCUIT										
(6) Kaminer v. NLRB, S.D. Miss., Civ. No. J75-105(N): Order, August 14, 1975, 90 LRRM 2269, Defendants' motion for reconsideration denied, September 23, 1975, 90 LRRM 3338.		X		X		X	NOT ARGUED OR DECIDED		NOT ARGUED OR DECIDED	
(7) Temple-Eastex, Incorporated v. NLRB, E.D. Tex., Civ. No. B-76-97-CA: Findings of fact, conclusions of Law & Order, March 22, 1975, 92 LRRM _____.		X	NOT DECIDED		NOT DECIDED			X		X
(8) ITT American Electric v. NLRB, N.D. Miss., Civ. No. DC-7638-S: Order, May 3, 1976, 92 LRRM _____.	X			X	X			X		X
(9) Robbins Tire & Rubber Co. v. NLRB, N.D. Ala., Civ. No. CA 76-528-NW: Memorandum of decision, April 16, 1976, 92 LRRM ____, appeal pending, 5th Cir., No. 76-2099.		X		X		X		X		X

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	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
SIXTH CIRCUIT										
NLRB v. Hardeman Garment Corp., W.D. Tenn. Civ.No. C-75-148: Order, November 25, 1975, 91 LRRM 2055; see also,Orders, January 6 and January 15, 1976, 91 LRRM 2853 and 91 LRRM 2335; 10) Order, February 3, 1976, 11) 91 LRRM 2425; see also, final Order, February 5, 1976; appeal pending, 6th Cir., No. 76-8021.		X		X		X	NOT ARGUED OR DECIDED			X
10) Amerace Corp. v. NLRB, W.D.Tenn., Civ. No.75-533: Order denying preliminary injunction, December 15, 1975, 91 LRRM 2344.	NOT ARGUED OR DECIDED		NOT ARGUED OR DECIDED		NOT ARGUED OR DECIDED		NOT ARGUED OR DECIDED			X
10) Atlas Industries v. NLRB, 12) N.D.Ohio, Civ. No. C76-27: 13) Order, February 12, 1976, Opinion & Order, February 23, 1976, 91 LRRM 2676.		X	ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		NOT DECIDED			X

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	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
(10)(14) Production Molded Plastics, Inc. v. NLRB, N.D. Ohio, Civ. No. C76-43A: Order denying preliminary injunction, February 13, 1976, 91 LRRM 2753	ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		NOT DECIDED			X
(10)Southwest Motor Freight, Inc. v. NLRB, E.D. Tenn., No. 1-76-69: Memorandum Order, April 13, 1976, 92 LRRM 2171	ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		NOT DECIDED			X
The Baptist Memorial Hosp. v. NLRB, W.D. Tenn.,Civ.No.C-76-103: Memorandum decision, April 2, 1976, 92 LRRM _____,appeal pending, 6th Cir., No. _____.		X		X		X		X	ARGUED BUT NOT DECIDED	

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	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
Chrysler Corp. v. NLRB, E.D. Mich, Civ. No. 572384: Orders granting and continuing temporary restraint, December 8 and 24, 1975, appeal pending, 6th Cir. No. 76-1269 (On injunction).	ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		X	
(15) Lamson & Sessions Co. v. NLRB, N.D.Ohio, Civ. No. C75-942: Order, February 6, 1976.	SEE NOTE									

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	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
SEVENTH CIRCUIT										
(16) Abrahamson Chrysler Plymouth, Inc. v. NLRB, N.D. Ill., Civ. No. 76-C-248: Memorandum opinion, January 29, 1976, 91 LRRM 2343.	ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		NOT DECIDED			X
(17) Television Wisconsin, Inc. v. NLRB, W.D. Wisc., Civ. No. 73-C-336: Opinion & order, February 3, 1976, 91 LRRM 2369.	NOT DECIDED		NOT DECIDED		NOT DECIDED		NOT DECIDED		ARGUED BUT NOT DECIDED	
(18) St. Elizabeth's Hospital v. NLRB, N.D. Ill., Civ. No. 76-C-371: Memorandum & Order, February 17, 1976, 91 LRRM 2453.	ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED	X		
(19) Satra Belarus, Inc. v. NLRB, E.D. Wisc., Civ. No. 76-C-94: Decision & Order, February 18, 1976, 91 LRRM 2555.	NOT DECIDED		NOT DECIDED		NOT DECIDED		NOT DECIDED		ARGUED BUT NOT DECIDED	

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		Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
	Hook Drugs, Inc. v. NLRB, S.D. Ind., Civ. No. IP 76-24-C: Memorandum entry and judgment, March 5, 1976, 91 LRRM 2797.	X		NOT ARGUED OR DECIDED		NOT ARGUED OR DECIDED		X		ARGUED BUT NOT DECIDED	
(20)	Andrew G. Grutka v. NLRB, N.D. Ind., Civ. No. H75-251: Order and Memorandum, February 12 and March 12, 1976, 92 LRRM _____.	NOT DECIDED		NOT DECIDED		NOT DECIDED		NOT DECIDED		X	
(1)	Electri-Flex Co. v. NLRB, N.D. Ill., Civ. No. 76-C 959: Order denying preliminary injunction, April 8, 1976, 92 LRRM 2142.	X		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		X		X	

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	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
EIGHTH CIRCUIT										
(21) Russell Stover Candies, Inc. v. NLRB, W.D. Mo., Civ. No. 75-CV 346-W-2: Opinion and order, June 13, 1975, 89 LRRM 2670.	NOT SPECIFICALLY DECIDED		NOT SPECIFICALLY DECIDED		NOT SPECIFICALLY DECIDED		NOT DECIDED			X

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CASE NAME & NUMBER (ARRANGED BY JUDICIAL CIRCUIT)	EXEMPTION 7(A) INTERFERENCE WITH ENFORCEMENT PROCEEDINGS		EXEMPTION 7(C) UNWARRANTED INVASION OF PERSONAL PRIVACY		EXEMPTION 7(D) DISCLOSURE OF IDENTITY OF OF CONFIDENTIAL SOURCE		EXEMPTION 5 "MEMORANDUMS & & LETTERS"		"BANNERCRAFT" STAY OF N.L.R.B. PROCEDURES PENDING F.O.I.A. DISPOSITION	
	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
NINTH CIRCUIT										
(22) Harvey's Wagon Wheel, Inc., v. NLRB, N.D. Cal. Civ. No. C-75-2487 SAW: Memorandum & order granting defendant's motion for summary judgment, February 5, 1976, 91 LRRM 2410, appeal pending, 9th Cir., No. 76-1355	X		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		NOT ARGUED OR DECIDED		X	
(23) Local 32, United Ass'n of J'men & Appren's.of the Plumbing & Pipefitting Industry of the U. S. & Canada v. Irving, W.D.Wash.- Civ.Nos. C76-39M, 100S: Order, February 20, 1976, 91 LRRM 2513, appeal pending, 9th Cir., No. 76-1688	X		X		X		X		X	

APPENDIX E
ANALYSIS OF F.O.I.A. LITIGATION FOR N.L.R.B. STATEMENTS
1975-1976

CASE NAME & NUMBER (ARRANGED BY JUDICIAL CIRCUIT)	EXEMPTION 7(A) INTERFERENCE WITH ENFORCEMENT PROCEEDINGS		EXEMPTION 7(C) UNWARRANTED INVASION OF PERSONAL PRIVACY		EXEMPTION 7(D) DISCLOSURE OF IDENTITY OF OF CONFIDENTIAL SOURCE		EXEMPTION 5 "MEMORANDUMS & & LETTERS"		"BANNERCRAFT" STAY OF N.L.R.B. PROCEDURES PENDING F.O.I.A. DISPOSITION	
	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
(5) Capital Cities Communications, Inc. v. NLRB, N.D.Cal., Civ. No. C-75-2352: Opinion & order, February 19, 1976, 91 LRRM 2565.	X		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED			X
Bellingham Frozen Foods, Inc. v. Henderson, W.D. Wash., Civ. No. C76-119M: Summary judgement & injunction, March 5,1976, 91 LRRM 2761, appeal pending, 9th Cir., No. 76-1684.	X		X		X		X		X	
(5) (24) McDonnell Douglas Corp. v. NLRB, C.D. Cal., Civ. No. CV76-0409 R: Findings of Fact, conclusions of law, and order, March 17, 1976, 92 LRRM 2072, appeal pending, 10th Cir., No. 76-1580.	X		X		X		X			X

APPENDIX E
ANALYSIS OF F.O.I.A. LITIGATION FOR N.L.R.B. STATEMENTS
1975-1976

CASE NAME & NUMBER (ARRANGED BY JUDICIAL CIRCUIT)	EXEMPTION 7(A) INTERFERENCE WITH ENFORCEMENT PROCEEDINGS		EXEMPTION 7(C) UNWARRANTED INVASION OF PERSONAL PRIVACY		EXEMPTION 7(D) DISCLOSURE OF IDENTITY OF OF CONFIDENTIAL SOURCE		EXEMPTION 5 "MEMORANDUMS & LETTERS"		"BANNERCRAFT" STAY OF N.L.R.B. PROCEDURES PENDING F.O.I.A. DISPOSITION	
	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
(1)(26) Vegas Village Shopping Corp. v. NLRB, C.D.Cal., Civ. No. CV76 916-RJK: Memorandum of decision, April 26, 1976, 92 LRRM 2683.	X		X		X		NOT ARGUED OR DECIDED		NOT ARGUED DECIDED	
(1)(22) Pacific Photo Type, Inc., v. NLRB, D. Haw., Civ.No. 75-0400, Decision and Order, May 6, 1976, 92 LRRM 2560.	X		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		NOT ARGUED OR DECIDED		X	

APPENDIX E
ANALYSIS OF F.O.I.A. LITIGATION FOR N.L.R.B. STATEMENTS
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CASE NAME & NUMBER (ARRANGED BY JUDICIAL CIRCUIT)	EXEMPTION 7(A) INTERFERENCE WITH ENFORCEMENT PROCEEDINGS		EXEMPTION 7(C) UNWARRANTED INVASION OF PERSONAL PRIVACY		EXEMPTION 7(D) DISCLOSURE OF IDENTITY OF OF CONFIDENTIAL SOURCE		EXEMPTION 5 "MEMORANDUMS & & LETTERS"		"BANNERCRAFT" STAY OF N.L.R.B. PROCEDURES PENDING F.O.I.A. DISPOSITION	
	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
TENTH CIRCUIT										
(24) Cessna Aircraft Co. v. NLRB, D. Kan., Civ. No. 75-111-C6: Order sustaining Plaintiff's motion for partial summary judgment, December 2, 1976, 90 LRRM 3339; see Opinion and order, August 21, 1975, 405 F.Supp.1042 90 LRRM 2376, opinion amended, December 2, 1975, 90 LRRM 3280. Judgment entered, January 26, 1976, amending order dated December 19, 1975; appeal pending, 10th Cir., No. 76-1121.		X		X		X		X		X
Climax Molybdenum Co. v. NLRB, D. Colo., Civ. Nos. 75-M-977, 1029: Opinion & order, November 14, 1975, 90 LRRM 3126, appeal pending, 10th Cir., No. 75-1979.	X		X		X		X		NOT ARGUED OR DECIDED	
(25) Margo Poss v. NLRB, D. Colo., Civ. No. 75-A-825: Memorandum opinion & order, December 17, 1975, 91 LRRM 2232, appeal pending, 10th Cir., No. 76-1328.	X		X		X		X		NOT ARGUED OR DECIDED	

APPENDIX E
ANALYSIS OF F.O.I.A. LITIGATION FOR N.L.R.B. STATEMENTS
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CASE NAME & NUMBER (ARRANGED BY JUDICIAL CIRCUIT)	EXEMPTION 7(A) INTERFERENCE WITH ENFORCEMENT PROCEEDINGS		EXEMPTION 7(C) UNWARRANTED INVASION OF PERSONAL PRIVACY		EXEMPTION 7(D) DISCLOSURE OF IDENTITY OF OF CONFIDENTIAL SOURCE		EXEMPTION 5 "MEMORANDUMS & & LETTERS"		"BANNERCRAFT" STAY OF N.L.R.B. PROCEDURES PENDING F.O.I.A. DISPOSITION	
	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
Jamco International, Inc. v. NLRB, N.D. Okla., Civ. No. 76-C-3: Findings of fact, conclusions of law, Order denying preliminary injunction & judgment, February 11, 1976, 91 LRRM 2446.	X		ARUGED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		X			X
Maremont Corporation v. NLRB, W.D. Okla., No. Civ.-76-0098-T: Order, March 3, 1976, 91 LRRM 2645, Final judgment on motions for summary judgment, injunction and stay order, March 17, 1976, 91 LRRM 2804, appeal pending, 10th Cir., No. _____.		X		X		X		X		X
(1) Gerico, Inc. v. NLRB, D. Colo., Civ. Nos. 76-F-44, 124: Memorandum Opinion & order, April 1976 (undated), 92 LRRM 2713.	X			X		X	NOT DECIDED		NOT ARGUED OR DECIDED	

APPENDIX E
ANALYSIS OF F.O.I.A. LITIGATION FOR N.L.R.B. STATEMENTS
1975-1976

CASE NAME & NUMBER (ARRANGED BY JUDICIAL CIRCUIT)	EXEMPTION 7(A) INTERFERENCE WITH ENFORCEMENT PROCEEDINGS		EXEMPTION 7(C) UNWARRANTED INVASION OF PERSONAL PRIVACY		EXEMPTION 7(D) DISCLOSURE OF IDENTITY OF OF CONFIDENTIAL SOURCE		EXEMPTION 5 "MEMORANDUMS & & LETTERS"		"BANNERCRAFT" STAY OF N.L.R.B. PROCEDURES PENDING F.O.I.A. DISPOSITION	
	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected	Claim Sustained	Claim Rejected
DISTRICT OF COLUMBIA CIRCUIT										
(5) General Cigar Co. v. NASH, D.D.C., Civ. No. 75-0913, Order denying preliminary injunction, July 1, 1975, 89 LRRM 2863.	ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED		ARGUED BUT NOT DECIDED			X

Notes to Appendix E

(1) Follows *Title Guarantee,* Second Circuit opinion.

(2) These cases, denying motions for preliminary injunctions to stay Board proceedings, did hold that the FOIA plaintiffs failed to establish a likelihood of success on the merits of Exemption 7. The courts in *Chassen Bakers* and *Florsheim* appeared to hold that they had jurisdiction to enjoin NLRB proceedings, but refused to issue injunctions on equitable grounds. The court in *Roger J. Au,* on the other hand, seemed to rule that it was without jurisdiction in this regard.

(3) The Board voluntarily postponed its unfair labor practice hearing to permit adjudication on the merits of the FOIA claim.

(4) This case involved a request for numerous records, only some of which were affidavits, involved in a back pay proceeding. The Court did not particularize its holdings with respect to the affidavits. Although it does not appear that an injunction was specifically requested, language in the Court's opinion suggests that it viewed itself without jurisdiction to enjoin Board proceedings. 91 LRRM at 3149.

(5) The Court concluded it had jurisdiction, but that it would not be appropriate to enjoin NLRB proceedings in the case at bar, on equitable grounds.

(6) This case involved a request for affidavits in a closed Board proceeding. The Court directed the submission of the statements for an *in camera* inspection.

(7) It is not clear whether the Board contended that the statements sought were also exempt under Exemp-

tions 7(C) and 5, and if so, whether the Court rejected these arguments.

(8) The Court ordered that affidavits favorable to the plaintiff should be disclosed, but sustained Board's position with respect to other affidavits. The Court found it unnecessary to issue an injunction in view of the time remaining prior to hearing.

(9) Distinguishing *Title Guarantee*, Second Circuit Opinion, on the ground that the plaintiff sought only the statements of persons who would testify at the Board hearing.

(10) Holding that the Court lacks jurisdiction to enjoin NLRB proceedings for purposes of compelling FOIA disclosure.

(11) Staying disclosure mandate pending appeal.

(12) See note 7, as to exemption 5.

(13) The Board asserted the Privacy Act of 1974, 5 U.S.C. §552a, as a further basis for withholding, but the Court did not reach this issue.

(14) The Board argued Exemption 6 as a basis for withholding, in addition to Exemptions 5, 7(A), (C) and (D), but the Court did not decide the merits of the exemption claims in the proceeding for the injunction.

(15) Summary judgment granted NLRB in default of Plaintiff's answer to Board motion.

(16) The Court suggested that the plaintiff failed to exhaust its FOIA administrative remedies, but deferred ruling on dismissal on this ground. The Court also held that the plaintiff had failed to establish a likelihood of success on the merits.

(17) The Court held that the plaintiff had failed to exhaust its administrative remedies, and therefore did not have to decide whether jurisdiction to enjoin NLRB proceedings could be founded on the FOIA. It did hold, however, that it was without jurisdiction to enjoin NLRB proceedings based on an alleged violation of due process, absent "extenuating circumstances."

(18) The Court granted an injunction based on the presence of "extenuating circumstances."

(19) See note 17.

(20) The Court rejected an attack on NLRB jurisdiction on constitutional grounds.

(21) The Court did not specify which subsection of amended Exemption 7 it was relying upon; it appeared to rely on the original exemption.

(22) A preliminary injunction was vacated upon order granting summary judgment.

(23) Following a decision on the merits of the FOIA claim, the Board was directed to furnish the statements not later than 7 days prior to hearing, failing which the Court stated it would enjoin the Board from conducting the hearing.

(24) The injunction was denied as unnecessary in the circumstances, although the Court suggested that one would be appropriate if the Board refused to grant disclosure.

(25) Plaintiff sought statements contained in a closed investigative file.

Notes to Appendix E

(26) The Court cited the Second Circuit's decision in *Title Guarantee* for the proposition that a district court does have jurisdiction under the FOIA to consider allegations of irreparable harm in preparing a defense to unfair labor practice charges, but held that the plaintiff had failed to show such harm in the case before it.

APPENDIX F

Annual Report of the NLRB to Congress for calendar year 1975 pursuant to the Freedom of Information Act as amended, 5 U.S.C. Sec. 552(d)

March 1, 1976

The President of the Senate
U.S. Senate
Washington, D.C. 20510

The Speaker of the House
U.S. House of Representatives
Washington, D.C. 20515

Dear Sirs:

The National Labor Relations Board, and the General Counsel of the National Labor Relations Board, submit the following report of their activities concerning the implementation of the Freedom of Information Act, 5 U.S.C. Section 552, during calendar year 1975. The report is in the format of the model Report Form provided for that purpose by letter of July 1, 1975 from the Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure.

1. Of the 1613 requests for records, an initial determination was made in 450 instances not to comply with the request, in whole or part.

2. The authority relied upon for such initial adverse determinations was as follows:

Appendix F

A. Exemptions in Section 552(b)

Exemption 1.	None
Exemption 2.	Relied upon in 14 determinations
Exemption 3.	None
Exemption 4.	Relied upon in 6 determinations
Exemption 5.	Relied upon in 392 determinations
Exemption 6.	Relied upon in 68 determinations
Exemption 7(a).	Relied upon in 409 determinations
Exemption 7(b).	None
Exemption 7(c).	Relied upon in 396 determinations
Exemption 7(d).	Relied upon in 312 determinations
Exemption 7(e).	None
Exemption 7(f).	None
Exemption 8.	None
Exemption 9.	None

B. Exemption 3 was not relied upon by this Agency.

C. In 12 instances requests were denied for failure to adequately describe the record requested.

In 4 instances a request was denied because no record existed containing the information requested.

Appendix F

In 2 instances the records were not furnished because the requester, after notice, failed to accept financial responsibility for costs which would be incurred under the applicable fee schedule.

3. The names, titles and instances of participation of those responsible for initial denials of requested records are as follows:

Robert S. Fuchs Director, Region 1	19
Sidney Danielson Director, Region 2	12
Thomas W. Seeler Director, Region 3	6
Peter W. Hirsch Director, Region 4	23
William C. Humphrey Director, Region 5	2
Henry Shore Director, Region 6	13
Bernard Gottfried Director, Region 7	33
Bernard Levine Director, Region 8	21
Emil C. Farkas Director, Region 9	2
Walter C. Phillips Director, Region 10	12

Appendix F

Reed Johnston Director, Region 11	3
Harold A. Poire Director, Region 12	7
Alex V. Barbour Director, Region 13	19
Glenn A. Zipp Officer-In-Charge Subregion 38	4
Joseph H. Solien Director, Region 14	20
Charles M. Paschal, Jr. Director, Region 15	9
W. Edwin Youngblood Director, Region 16	10
Thomas C. Hendrix Director, Region 17	8
Robert J. Wilson Director, Region 18	0
Charles M. Henderson Director, Region 19	14
Elwood G. Strumpf Officer-In-Charge Subregion 36	[illegible]
Natalie P. Allen Director, Region 20	29
Dennis R. MacCarthy Officer-In-Charge Subregion 37	4

Appendix F

Wilford W. Johansen Director, Region 21	14
Arthur Eisenberg Director, Region 22	9
Louis V. Baldovin, Jr. Director, Region 23	5
Raymond J. Compton Director, Region 24	4
William T. Little Director, Region 25	14
Raymond A. Jacobson Director, Region 26	6
Francis Sperandeo Director, Region 27	13
Milo V. Price Director, Region 28	4
Samuel M. Kaynard Director, Region 29	17
George Squillacote Director, Region 30	2
Abraham Siegel Director, Region 31	8
John C. Truesdale Executive Secretary	12
Standau E. Weinbrecht Freedom of Information Officer	70

4. There were 116 determinations of inter-agency appeals made from adverse initial determinations.

Appendix F

A. In 3 instances, the appeal was granted in full as a matter of administrative discretion.

B. In 104 instances the appeal was denied in full.

C. In 4 instances, non-exempt portions of requested records were supplied. In 5 instances portions of requested records considered exempt were nonetheless supplied as a matter of administrative discretion.

5. The authority relied upon for such adverse determinations on appeal was as follows:

A. Exemptions in Section 552(b)

Exemption 1.	None
Exemption 2.	Relied upon in 2 determinations
Exemption 3.	None
Exemption 4.	Relied upon in 2 determinations
Exemption 5.	Relied upon in 39 determinations
Exemption 6.	Relied upon in 6 determinations
Exemption 7(a)	Relied upon in 73 determinations
Exemption 7(b)	None
Exemption 7(c)	Relied upon in 59 determinations
Exemption 7(d)	Relied upon in 57 determinations
Exemption 7(e)	Relied upon in 1 determination
Exemption 7(f)	None
Exemption 8	None
Exemption 9	None

B. Exemption 3 was not relied upon by this Agency.

Appendix F

C. All appeals were denied upon the basis of applicable exemptions.

6. The names, titles and instances of participation of those responsible for determinations on appeal are as follows:

Betty S. Murphy Chairman	3
Peter G. Nash[1] General Counsel	60
John C. Miller[2] Acting General Counsel	22
John S. Irving[3] General Counsel	31

7. No court opinions or orders giving rise to proceedings under subsection (a)(4)(F) concerning determinations made by this Agency were issued during the report year.

8. A copy of Section 102.117 of the Board's Rules and Regulations, which provides procedures for the availability of information under the Freedom of Information Act, is attached as Appendix A.

9. A copy of the fee schedule for chargeable services in relation to FOIA requests is attached as Appendix B. A total of $1,417.48 in fees billed under the schedule was collected during the report year.

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[1] Term expired 8/15/75

[2] Acting 8/16/75 - 11/30/75

[3] Assumed office 12/1/75

10. The Agency's efforts during the report year to perform its responsibility under the statute in the spirit of congressional intent required an extended effort, particularly to accommodate our ability to respond to the new 10 day time limit for the initial determination. The administrative drive mounted in December 1974 to establish appropriate procedures continued throughout the first few months of 1975. To assure timely initial determinations of requests, rule changes were made to provide that a request should be made to whichever location of the Agency had the records being requested. Since thirty-one Regional Directors for the first time became responsible for making initial determinations under the revised rules, a detailed set of guidelines was prepared by the General Counsel to guide them in processing the requests, and to assure a consistent approach to the determinations. These guidelines were made publicly available and widely disseminated through publication in one of the commercial labor relations law reporting services. The procedures established have been functioning well with appropriate attention to promptness of response, as attested to by the fact that on only three occasions of the more than 1700 determinations of requests, initially and on appeal, have extensions of time for response been necessary.

The statistics set forth in items 1 through 6 above do not reflect the essential nature of this Agency's experience under the Freedom of Information Act during the report year. As an agency wholly engaged in investigation and adjudication of alleged violations of the National Labor Relations Act, the only significant body of records it compiles and maintains are the investigatory and adjudicatory files pertaining to the cases it processes. Over the years the Board has consistently maintained, with equally consistent

judicial approval, a policy of protecting the confidentiality of the contents of those files except as their contents are properly disclosed pursuant to the Board rules governing the conduct of the proceedings before it. During the past year, however, parties to proceedings before the Board have increasingly resorted to Freedom of Information Act procedures and law suits in an effort to obtain materials from the investigatory files—i.e., affidavits, attorney memoranda, etc.—not available to them at that time under agency procedures. Thus, almost 40% of the initial requests are from parties to a pending proceeding seeking records pertaining to the proceedings. (Another 50% of the initial requests cite the FOIA to obtain documents such as decisions, formal papers, etc., which have always been routinely available upon request and involve no exemption considerations.) All but one of the 116 determinations on appeal were similarly from parties seeking investigatory file documents. By the end of the year such appeals were being resolved at the rate of about 50 per month and at year's end there were 44 appeals—none overdue a response—pending determination. This situation prevails notwithstanding that the Supreme Court in *Renegotiation Board* v. *Bannercraft,* 415 U.S. 1 (1974), has made it clear that the FOIA was not intended to serve as a discovery tool and does not accord litigants any greater access to investigatory and adjudicative files than previously existed. See also, *N.L.R.B.* v. *Sears, Roebuck and Co.,* 421 U.S. 132.

The same phenomenon of use of the FOIA as a discovery tool pervades the flood of FOIA litigation this Agency has experienced in the federal district courts. During the report year the Agency was respondent in 31 FOIA proceedings in district and appellate courts, of which 23 are still open, 8 of them on appeal. Further, new FOIA

suits are now being filed by parties to Board proceedings at a rate of 20 per month. In most of the suits an injunction is sought to restrain the Board hearing in its proceeding until the federal suit is resolved. The determinations at issue in these suits routinely involve applications of Exemptions 5 and 7 to information and documents in the investigatory files. It is our confident expectation that the Agency's positions in this respect will prevail, founded as they are upon Supreme Court holdings in *N.L.R.B.* v. *Sears, Roebuck and Company, supra, Renegotiation Board* v. *Grumman Aircraft*, 421 U.S. 163, *Renegotiation Board* v. *Bannercraft, supra*, and other strong decisional authority. But until the issues are resolved by the courts, this vexatious flood of litigation will continue to burden the Agency's resources.

A. The Agency continues to utilize neutralization techniques wherever possible to permit release of documents as well as providing segregable portions of documents wherever reasonable. No new categories of records have been identified for release upon request, although as a result of the Supreme Court decision in *N.L.R.B.* v. *Sears, Roebuck and Co., supra*, advice memoranda issued by the General Counsel authorizing dismissal of a charge are made available as soon as acted upon by the regional director, rather than as previously only after any appeal has been resolved or the time for filing an appeal has expired.

B. Incremental costs incurred by the Agency in administering the Act during the report year were in excess of $495,000. The cost of processing initial requests and appeals from initial determinations was in excess of $113,000. Litigation costs, largely of senior staff time, were in ex-

cess of $94,000. Other administrative costs in organizing and managing the FOIA function in the Agency were in excess of $32,000.

Other incremental costs are those associated with the classification and indexing of decisional material, and the publication of indexes thereto, which would not be performed for Agency use but is being performed under court mandate resulting from FOIA litigation. This cost during the year, which includes copy preparation but not printing costs for the indexes which are only now being printed, is in excess of $251,000.

The above cost figures include over 13 professional person-years, mostly at a senior staff level, and almost 5 clerical person-years.

C. On only three occasions was the Agency unable to respond to a request or rule on an appeal within the prescribed time limits. On two occasions the Freedom of Information Officer in Washington, D.C. extended the time for an initial response, once for five days and once for ten days, when delays were encountered in obtaining necessary records from storage in Federal Records Center. An extension of ten days was taken to rule on an appeal where delay was encountered in obtaining the relevant case files from a regional office.

There were no court appeals taken on the basis of exhaustion of administrative procedures because the Agency was unable to respond within the applicable time limits, nor was there occasion for any court to allow additional time for responses.

D. As noted above, a comprehensive set of guidelines was issued by the General Counsel to assist those responsible for handling requests under the statute and contri-

bute to a consistency of determination throughout the various regional offices. These guidelines were the subject of a press release and copies were made available to the public upon request. They were printed in their entirety in a commercial labor relations law reporting service, at 152 *Daily Labor Report* (Special Supplement, Aug. 6, 1975). A copy of the guidelines is attached as Appendix C.

Respectfully submitted,

BETTY SOUTHARD MURPHY
Chairman
National Labor Relations Board

JOHN S. IRVING
General Counsel
National Labor Relations Board

Enclosures

[Enclosures omitted]

No. 75-1880

In the Supreme Court of the United States

OCTOBER TERM, 1976

TITLE GUARANTEE COMPANY, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

JOSEPH P. NORELLI,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a)[1] is reported at 534 F. 2d 484. The opinion of the district court (Pet. App. 21a-35a) is reported at 407 F. Supp. 498.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1976 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on June 28, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the appendix to the petition. "A." refers to the appendix in the court below.

QUESTION PRESENTED

Whether the pre-trial disclosure of statements of employees and their representatives obtained by the National Labor Relations Board in the investigation of a pending unfair labor practice case would "interfere with enforcement proceedings," so that the statements are exempt from disclosure, under Exemption 7(A) of the Freedom of Information Act.[2]

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, as amended, 5 U.S.C. 552, and the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519), 29 U.S.C. 151, *et seq.*, are set out at pp. 43a-47a of the petition.

STATEMENT

A. The Unfair Labor Practice Proceeding

On May 28, 1975, District 65, Wholesale, Retail, Office and Processing Union, Distributive Workers of America ("the Union") filed an unfair labor practice charge (A. 10) with the Second Region of the National Labor Relations Board ("the Board"). The charge alleged that the Title Guarantee Co. ("the Company") had violated

[2]The petition also seeks to raise (Pet. 2-3) two additional questions: whether the above-described statements are exempt from disclosure under Exemptions 7(C), 7(D), and 5 of the Act; and whether, if no exemption covers them, the district court may not only require their production, but also enjoin the Board unfair labor practice proceeding until they are produced. In view of its holding that Exemption 7(A) covers these statements, the court of appeals had no occasion to reach these additional questions (Pet. App. 10a, 17a and n. 15). However, should the petition be granted, we reserve the right to argue that the matter sought is also protected by Exemptions 7(C), 7(D), and 5, and that, even if no exemption is applicable, the district court could not properly enjoin the unfair labor practice proceeding.

Section 8(a)(3) and (1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(a)(3) and (1), by refusing to execute a collective bargaining agreement which had been previously agreed upon with the Union. Subsequent amendments to the charge alleged refusal to bargain, in violation of Section 8(a)(5) of the NLRA, 29 U.S.C. 158 (a)(5) (A. 12, 14). On June 30, 1975, the Regional Director, after conducting an investigation, issued a complaint (A. 15-20) alleging that the Company had refused to bargain. The hearing on the complaint was scheduled for September 8, 1975 (A. 19).

By letter of July 2, 1975, the Company, invoking the Freedom of Information Act ("FOIA"), asked the Regional Director that "copies of all written statements, signed or unsigned, contained in the Board's case files * * * be made available for inspection and copying" and that "any such statements taken subsequent to [that] date * * * also be made available" (A. 26-27). The Regional Director denied the Company's request on the ground that the information was privileged from disclosure by Exemptions 5 and 7(A), (C), and (D) of the FOIA, 5 U.S.C. 552(b)(5) and 5 U.S.C. (Supp. IV) (7)(A), (C), and (D) (A. 28-30). The Company filed an appeal with the Board's General Counsel (A. 31-32). On August 1, 1975, the General Counsel denied the appeal for substantially the reasons given by the Regional Director (A. 33-34).

B. The FOIA Suit

On August 5, 1975, the Company filed this suit in the United States District Court for the Southern District of New York, under the FOIA, 5 U.S.C. (Supp. IV) 552 (a)(4)(B). The complaint alleged that the statements sought were records required to be disclosed under 5 U.S.C. 552(a)(3), that the "failure and refusal to furnish the requested information [was] arbitary and capricious," and that, "[i]f Plaintiff [did] not receive the requested infor-

mation a reasonable time prior to the hearing scheduled for October 14, 1975[3] * * * Plaintiff [would] be wrongfully precluded from properly preparing its defense to the allegations contained in the Board's Complaint and [would] thereby suffer irreparable injury for which no adequate remedy at law exists" (A. 7-8). The Company sought, *inter alia*, a mandatory injunction compelling production of the statements, a preliminary injunction enjoining the Board from holding its hearing pending final adjudication of the FOIA request, and a permanent injunction enjoining the Board from holding its hearing until a reasonable time after it provided the statements (A. 8-9).

The Board moved to dismiss the complaint, or, alternatively, for summary judgment (A. 35-37). The Company filed a cross-motion for summary judgment (A. 38-42). The district court, after hearing argument and making an *in camera* inspection of the material, granted the Company's cross-motion for summary judgment and directed the Board "to turn over the material sought by the plaintiff for inspection and copying forthwith" (A. 76). The court also enjoined the unfair labor practice hearing until the Board complied with the production order (A. 76).

The court of appeals reversed (Pet. App. 1a-20a). The court agreed with the Board that "statements of employees, and their representatives, obtained in connection with unfair labor practice enforcement proceedings are not subject to disclosure as a result of Exemption 7(A)" (Pet. App. 16a). It added, however, that "we do not intend our comments to apply broadly to administrative contexts other than unfair labor practice enforcement proceedings before the NLRB" (*ibid.*). The court of appeals remanded the case to the district court "with instructions to vacate

[3]The hearing had been postponed at the Company's request (A. 21, 22).

its order staying the [Board's] proceedings" (Pet. App. 18a).[4]

ARGUMENT

The decision of the court of appeals is correct and has been followed by three other courts of appeals which have recently ruled on the same question.[5] Moreover, the decision below is narrow and in terms applies only to Board unfair labor practice proceedings. There is no occasion for review by this Court.

1. The original Exemption 7 to the FOIA protected against disclosure of

> investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

Statements of prospective witnesses obtained by Board agents during their investigation of unfair labor practice charges or objections to a Board conducted election were uniformly held to be covered by the original Exemption 7. *Wellman Industries, Inc.* v. *National Labor Relations Board*, 490 F. 2d 427 (C.A. 4), certiorari denied, 419 U.S. 834. See also *Clement Brothers Co.* v. *National Labor Relations Board*, 282 F. Supp. 540, 542 (N.D. Ga.), approved, *National Labor Relations Board* v. *Clement Brothers Co.*, 407 F. 2d 1027, 1031 (C.A. 5); *Barceloneta Shoe*

[4]The court of appeals, however, subsequently granted the Company's request for a stay of its mandate pending the filing and disposition of a petition for certiorari.

[5]*Goodfriend Western Corp.* v. *Fuchs*, C.A. 1, No. 76-1116, decided May 6, 1976, petition for a writ of certiorari pending, No. 76-51; *Roger J. Au & Son, Inc.* v. *National Labor Relations Board*, C.A. 3, No. 76-1228, decided July 8, 1976; *Climax Molybdenum Co.* v. *National Labor Relations Board*, C.A. 10, No. 75-1979, decided July 26, 1976.

Corp. v. *Compton*, 271 F. Supp. 591, 593-594 (D. P.R.), cited with approval, *Bristol Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935, 939 (C.A. D.C.), certiorari denied, 400 U.S. 824.

These decisions rested on two predicates. First, blanket disclosure of such statements would contravene the basic purposes of the exemption, which were (1) to prevent premature disclosure of the results of the government's investigation, thereby insuring that it could present its strongest case in court, and (2) to protect the government's sources so that persons having information would be willing to volunteer it without fear of reprisal or invasion of their privacy. See *Wellman Industries, Inc.* v. *National Labor Relations Board*, *supra*, 490 F. 2d at 431, and cases there cited.

Second, Congress had committed the matter of discovery to the Board's rule-making power.[6] The Board's rules provide that a pre-trial statement becomes available to a litigant only "after a witness called by the general counsel or by the charging party has testified in a hearing * * *," when such statement may be used "for the purpose of cross-examination." 29 C.F.R. 102.118(b)(1) (1975). This rule rests on the Board's judgment that, because of the fear of reprisal from the employer or the union, employees and others would be reluctant to furnish information to the Board without the assurance that it will not be disclosed unless and until they testify at a formal hearing.[7]

---

[6] See, *e.g.*, *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854 (C.A. 2), certiorari denied, 402 U.S. 915; *Electromec Design and Development Co.* v. *National Labor Relations Board*, 409 F. 2d 631 (C.A. 9); *D'Youville Manor* v. *National Labor Relations Board*, 526 F. 2d 3 (C.A. 1).

[7] See *National Labor Relations Board* v. *Lizdale Knitting Mills, Inc.*, 523 F. 2d 978, 980 (C.A. 2); *National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199, 206 (C.A. 7).

Over 94 percent of all unfair labor practice cases closed during fiscal year 1975 were closed prior to hearing (National Labor Relations Board, Fortieth Annual Report 221 (1975)), and many affiants who gave statements in the remaining 6 percent of the cases were never called to testify because their testimony would have been cumulative or irrelevant to the issues ultimately framed in the complaint.

2. In 1974, Exemption 7 was amended, in pertinent part, to cover (5 U.S.C. (Supp. IV) 552(b)(7))—

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings * * *.

Senator Hart, the sponsor of the amendment, stated that the original purpose of Congress in enacting Exemption 7 was "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have." 120 Cong. Rec. 17033 (1974). He added (*ibid.*):

> Recently, the courts have interpreted the seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes—a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.
>
> That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966. Then, as now, we recognized the need for law enforcement agencies to be able to keep their records and files confidential where a disclosure would interfere with any one of a number of specific inter-

ests, each of which is set forth in the amendment that a number of us are offering.

Specifically, the amendment was aimed at a series of decisions by the Court of Appeals for the District of Columbia Circuit[8] in 1973-1974, which had interpreted Exemption 7 as covering any information contained in an investigatory file originally compiled for law enforcement purposes, regardless of whether future enforcement proceedings were possible in that case, or whether the information was otherwise available to the public.[9]

---

[8] *Center for National Policy Review on Race and Urban Issues* v. *Weinberger*, 502 F. 2d 370 (C.A. D.C.); *Ditlow* v. *Brinegar*, 494 F. 2d 1073 (C.A. D.C.); *Aspin* v. *Department of Defense*, 491 F. 2d 24 (C.A. D.C.); *Weisberg* v. *Department of Justice*, 489 F. 2d 1195 (C.A. D.C.).

[9] This is demonstrated by the following colloquy between Senators Kennedy and Hart:

> Mr. Kennedy. * * * Does the Senator's amendment in effect override the court decisions in the court of appeals on the Weisberg against United States; Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger?
>
> * * * As I interpret it, the impact and effect of his amendment would be to override those particular decisions. Is that not correct?
>
> Mr. Hart. The Senator from Massachusetts is correct. That is its purpose. That was the purpose of Congress in 1966, we thought, when we enacted this. Until about 9 or 12 months ago, the courts consistently had approached it on a balancing basis, which is exactly what this amendment seeks to do. [120 Cong. Rec. 17039-17040 (1974).]

Senator Hart also stated, at another point:

> This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information. [*Id.* at 17034.]

There is no indication that Congress intended to overrule cases such as *Wellman Industries*, *supra*, holding that witness statements obtained by the Board in an investigation of an on-going case were exempt from disclosure under the original Exemption 7. As shown, these decisions recognized that "[d]iscovery with respect to government witnesses is restricted in recognition of the peculiar character of labor litigation: the witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment." *Roger J. Au & Son, Inc.* v. *National Labor Relations Board*, *supra*, n. 5, p. 5 (slip op. 5). Thus Senator Hart explained that the amendment would continue to bar disclosure:

> First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. [120 Cong. Rec. 17033 (1974).]

This reasoning is equally applicable to enforcement proceedings before the Board.

3. In view of this history, the court of appeals correctly held that "statements of employees, and their representatives, obtained in connection with unfair labor practice enforcement proceedings are not subject to disclosure as a result of Exemption 7(A)" (Pet. App. 16a). Accord: *Goodfriend Western Corp.* v. *Fuchs*, *supra*; *Roger J. Au & Son, Inc.* v. *National Labor Relations Board*,

supra; Climax Molybdenum Co. v. National Labor Relations Board, supra (see n. 5, p. 5, *supra*). As the court stated, "[w]e cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA" (Pet. App. 15a). "In light of the delicate relationship which exists between employer and employee, we think that Congress would be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery" (Pet. App. 16a).[10]

A different conclusion is not required by the 1974 change of the FOIA in 5 U.S.C. (Supp. IV) 552(a)(4)(B), which provides that the district court "may examine the contents of * * * agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions * * * and the burden is on the agency to sustain its action." As the court of appeals stated, an *in camera* inspection is unnecessary with repect to "statements obtained by the NLRB from employees, or their representatives, in connection with unfair labor practice proceedings" (Pet. App. 14a). The very nature of such statements, the court properly concluded (*ibid.*), shows that their pre-hearing release would interfere with enforcement proceedings in two ways. "[F]irst, suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; second, employees who are interviewed

[10]See *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 ("Discovery for litigation purposes is not an expressly indicated purpose of the Act."); *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143, n. 10 ("The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants.")

may be reluctant, for fear of incurring employer displeasure, to have it known that they have given information [citation omitted], or union officials might not want to volunteer information for fear of compromising the union's position in negotiations * * *" (Pet. App. 13a-14a). These considerations, of course, apply particularly in unfair labor practice proceedings, and the court of appeals limited its holding to such proceedings (Pet. App. 16a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

JOSEPH P. NORELLI,
Attorney,
National Labor Relations Board.

AUGUST 1976.

DOJ-1976-08

In The

Supreme Court of the United States

October Term, 1975

No. 75-1880

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of THE TI CORPORATION (OF CALIFORNIA),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF BARNES AND NOBLE BOOKSTORES, INC., AS *AMICUS CURIAE*

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vs.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF BARNES AND NOBLE BOOKSTORES, INC., AS *AMICUS CURIAE*

INTRODUCTION

This brief is on behalf of Barnes and Noble Bookstores, Inc., as *amicus curiae* filed pursuant to written consent of the parties under Rule 42(2) of this Court. It is in support of the petitioner, The Title Guarantee Company, a Subsidiary of Pioneer National Title Insurance Company, a Subsidiary of Title Insurance and Trust Company, a Subsidiary of The Ti Corporation (of California).

INTERESTS OF THE *AMICUS CURIAE*

Barnes and Noble Bookstores, Inc. is the respondent in an unfair labor practice proceeding now pending before the National Labor Relations Board (Case No. 2-CA-13940).

Barnes and Noble Bookstores, Inc. is also the plaintiff in *Barnes and Noble Bookstores, Inc. v. National Labor Relations Board* now pending before the United States District Court for the Southern District of New York (Civil Action No. 76 Civ. 1168). That lawsuit, like the instant case, involves a claim under the Freedom of Information Act, 5 U.S.C. §552, (hereinafter "the FOIA" or "the Act") for production of investigatory affidavits obtained by the National Labor Relations Board (hereinafter "the NLRB" or "the Board").[1] The decision by the Court in this case will undoubtedly affect the outcome of that action.

1. On March 12, 1976, the District Court issued a mandatory injunction requiring the Board to turn over to Barnes and Noble certain affidavits it had obtained during the unfair labor practice charge investigation. The court directed, as part of its order, that the names of the affiants be redacted; that the affidavits be furnished for the confidential use of counsel only; that no copies of the affidavits be made; and that the affidavits be returned to the Board following such use. The order of the District Court is annexed hereto as Appendix A. On April 12, 1976 the Board filed a notice of appeal from this order and moved in the Court of Appeals for summary reversal. On April 22, 1976, the Court of Appeals denied without prejudice the motion for summary reversal and remanded the case to the District Court for further consideration in light of its decision in *Title Guarantee*, 91 LRRM 2993. The order of the Court of Appeals is annexed hereto as Appendix B. On May 25, 1976, the Board filed a motion to vacate the order of the District Court and to dismiss the complaint. That motion is now pending before the District Court.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Circuit Court below erroneously concluded that a blanket exemption exists under Exemption 7A of the FOIA, 5 U.S.C. §552(b)7(A) requiring nondisclosure of investigatory affidavits in "open" NLRB unfair labor practice cases. The court declined to decide whether such an exemption also exists under Exemptions 7(C)(D) and 5 of the Act, 5 U.S.C. §552(b)(7)(C)(D) and (5), though the Board claimed each of those sections as a basis for nondisclosure.

The issues presented here are of critical importance to the efficient administration of the National Labor Relations Act, §29 U.S.C. §151 *et seq.* (hereinafter the "NLRA"), an important segment of the labor law of the country. Concerning as it does the case handling of virtually every unfair labor practice proceeding, consideration by the Court is essential.

REASONS FOR GRANTING THE WRIT

I.

The Issue and Effects of the Decision of the Court of Appeals

The issues presented by this case are of importance to all parties appearing before the NLRB. The final decision herein will consider whether, and under what circumstances, a party in an open unfair labor practice proceeding may obtain production of affidavits obtained by the Board during the course of its investigation. The decision will further determine whether an injunction may issue staying Board proceedings pending the NLRB's appeal of an order directing disclosure under the FOIA, and, if so, the appropriate circumstances therefor.

The Court of Appeals has broadly determined that the NLRB may refuse to disclose *any* affidavits obtained in connection with an open unfair labor practice case without any

prior specific showing that such disclosure would result in the harm set forth in Exemption 7(A). In view of the likelihood that unless reversed by this Court, the decision in *Title Guarantee* will be followed by other circuits, (see *Goodfriend Western Corp. v. Fuchs,* 92 LRRM 2466) the effect of this decision will be to create a blanket exemption under the FOIA for affidavits obtained in NLRB unfair labor practice proceedings. Such a result would be contrary to the intent of the statute.

II.

The 1974 Amendments to the FOIA Were Not Intended to Apply Only to Closed Cases

The Court of Appeals has construed the 1974 Amendment enacting Exemption 7A as intending only to revise the prior law with respect to "closed" investigative files while leaving the law with respect to "open" cases unchanged. *Title Guarantee,* 91 LRRM 2993, 2997-2998. In so holding, the court relied on the fact that Senator Hart's amendment was suggested by the Administrative Law Section of the American Bar Association. That report was based in turn upon the report of the Committee on Federal Legislation of the Association of the Bar of the City of New York, which had criticized *Frankel v. SEC,* 460 F.2d 813 (2nd Cir.), *cert. denied,* 409 U.S. 889 (1972), a case involving a closed investigation file. This rationale has been specifically followed by the First Circuit in *Goodfriend Western Corp. v. Fuchs,* 92 LRRM 2466, and, unless reversed by this Court will likely be followed in other circuits. The net result of this approach will be to severely limit the scope of the 1974 Amendments. These Amendments may not be so narrowly construed.

In considering the form of the 1974 Amendments, Congress seriously considered two versions. One was the Attorney General's proposal and the other the proposal of the Bar of the City of New York. The only difference between these two

versions was that the Attorney General's would have specifically exempted open files from disclosure while the New York Bar version contained no such limitation. As noted by the Court of Appeals, it was this latter proposal which was adopted by Congress. *Title Guarantee, id.* Moreover, it should be noted that one of the cases specifically overruled by the 1974 Amendment, *Ditlow v. Brinegar,* 494 F.2d 1073 (D.C. Cir. 1974), cited by the court in footnote 8 of its decision, involved a refusal to disclose information with respect to a *pending investigation.* (Emphasis added.)

In establishing this blanket exemption for investigatory affidavits, the court specifically adopted two arguments of the Board:

First, that suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied;

Second, employees who are interviewed may be reluctant, for fear of incurring employer disclosure, to have it known that they have given information, or union officials might not want to volunteer information for fear of compromising the union's position in negotiations.

Such assumptions by the court are not sanctioned by the Act. The court may not utilize such rationale to circumvent the specific requirements of the Act that the agency must establish its right to the exemption by demonstrating to the district court that production *would* interfere with the Board's enforcement proceeding. This section must be read to require that the requisite showing be made with respect to the enforcement proceeding in each particular case, and not enforcement proceedings generally.

III.

The Question of Whether Exemptions 5, 7(C) or 7(D) Require Nondisclosure of Board Investigatory Affidavits in Open Unfair Labor Practice Cases

The question of whether Exemptions 5, 7(C) or 7(D) of the Act require nondisclosure was expressly left undecided by the Court of Appeals since it sustained the Board's position on Exemption 7(A). It is important for the efficient administration of the NLRA that the Court decide whether these provisions are applicable, as such claims are consistently raised by the Board in all FOIA cases.

CONCLUSION

Important questions concerning the proper interpretation of the Freedom of Information Act and the proper administration of the National Labor Relations Act are presented by this case. The questions affect all litigants appearing before the National Labor Relations Board and the Board itself. Accordingly, the Court is respectfully urged to grant the petition.

Respectfully submitted,

s/ Robert M. Saltzstein
s/ Jeffrey L. Kreisberg

MIRKIN, BARRE,
SALTZSTEIN &
GORDON, P.C.

APPENDIX A — ORDER OF THE DISTRICT COURT, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MP

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BARNES & NOBLE BOOKSTORES, INC.,

Plaintiff,

vs.

NATIONAL LABOR RELATIONS BOARD,

Defendant.

76 Civil 1168

New York, N.Y.

March 12, 1976 - 10:30 a.m.

Before

HON. MILTON POLLACK,

District Judge.

APPEARANCES:

MIRKIN, BARRE, SALTZSTEIN & GORDON, P.C.
Attorneys for Plaintiff
CLIFFORD S. BART, Esq., and
ROBERT M. SALTZSTEIN, Esq., of Counsel

JOHN S. IRVING, Esq.,
General Counsel
EDWARD BENNETT, Esq.,
Regional Attorney
Attorneys for Defendant
RAYMOND P. GREEN, Esq., and
ALEXANDER ROSENBERG, Esq., of Counsel

EISNER, LEVY & STEEL, P.C.,
Attorneys for Charging Party
EUGENE G. EISNER, Esq., of Counsel

- - -

[2]THE COURT: The defendant is hereby directed forthwith to make disclosure of the statements of the witnesses whom they are to call at the prospective hearing, redacting therefrom the names and the addresses of the persons whose affidavits are so turned over.

The affidavits in question are those which would be required, and to the extent only that they will be required, to be turned over to the plaintiff after the witness has testified in the hearing upon the complaint under Section 10(c) of the Act.

In the event that this order is not obeyed, this Court directs a stay of the hearing now set until compliance herewith.

The purpose is to afford within the spirit of the law a fair and impartial opportunity to the respondent in the Labor Board case to adequately prepare for trial and for cross-examination of the witnesses involved.

The scope of this requirement is specifically limited to the statements of those whom the NLRB has informed the Court will be produced as witnesses at the hearing involved.

In making this ruling, the Court is mindful of the amendment to the Freedom of Information Act effective on or about November 21, 1974, which deleted former Section 7 and [3] substituted as Section 7 the following exemption in respect of the production of investigatory files:

The investigatory records that have been compiled for law enforcement purposes are not hereby required to be produced to the respondent in the proceeding but only to the extent, as stated in the statute, that the production of the affidavits of these prospective witnesses would

(a) Interfere with enforcement proceedings; (No such claim is here made).

(b) Deprive a person of the right to a fair trial and an impartial adjudication; (No such claim is here made).

(c) Constitute an unwarranted invasion of personal privacy; (No such claim is here made).

(d) Disclose the identify of a confidential source; (No such claim is here made. To the contrary, it is intended to disclose the source by placing the affiant on the witness stand in the proceeding).

(e) Disclose investigative techniques and procedures; (This is thoroughly inapplicable, in the circumstances).

(f) Endanger the life or physical safety of law enforcement personnel. (This is inapplicable here.)

This ruling is not intended to derogate from the decided case law that there is no proper right of a respondent in a Labor Board proceeding to require discovery and deposition [4] procedures as normally apply in ordinary civil cases. The sole

purpose of this ruling is to regulate the timetable for the production to one which will not be embarrassed by the disclosed inability of the Administrative Law Judge to give sufficient time to allow a continuance to the responding party because of obligations requiring the judicial officer to give only a limited opportunity to the case so that he can go on in another locality to others of the many thousands of cases that the Labor Board is required to hear.

It is no excuse for a Court to say that a respondent shall not have a fair opportunity to know the charges and to prepare himself against the charges to be made by prospective witnesses because the Court is under time pressures. That is not due process.

The motion is disposed of accordingly.

This shall constitute an order.

MR. GREEN: Your Honor, for the record, I would like to make a motion that you stay your order.

THE COURT: That what?

MR. GREEN: For the record, I would like to make a motion that you stay your order.

THE COURT: The motion for a stay of this order is denied. Compliance is directed to be made forthwith.

Is there any reason why physically you cannot [5] comply other than you want to oppose the application?

MR. GREEN: No; there is no physical reason for non-compliance. I would urge the Court to consider in its order that the documents that are to be disclosed be kept by counsel for respondent and not turned over to any other source.

THE COURT: I will add to the ordering providing that these documents are furnished for the confidential use of counsel only and in order to enable counsel to understand the charges against his client and to prepare therefor with adequate time in that regard. The documents are to be returned to the Labor Board files upon satisfying the need for their use, and no copies thereof are to be made by the readers of the documents.

That constitutes an amendment to the order.

The foregoing shall constitute the findings of fact and conclusions of the Court, in pursuance of Rule 52(a) of the Federal Rules of Civil Procedure.

Is that clear, Mr. Saltzstein?

MR. SALTZSTEIN: Yes; it is, your Honor.

THE COURT: And Mr. Bart?

MR. BART: Yes, your Honor.

THE COURT: And you are prepared to comply with those requirements?

[6] MR. BARR: Yes, your Honor.

MR. SALTZSTEIN: Yes, your Honor.

THE COURT: All right.

- - -

APPENDIX B — ORDER OF THE COURT OF APPEALS, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No.3 4-27-76

76-8149 C-32

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of April, one thousand nine hundred and seventy-six.

Barnes and Noble Bookstore, Inc.,

Plaintiff-Appellee,

v.

National Labor Relations Board,

Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant dated April 12, 1976 to summarily reverse the order of the United States District Court for the Southeron District of New York be and it hereby is denied without prejudice to the National Labor Relations Board's position.

It is further ordered that this action be and it hereby is remanded to the United States District Court for further consideration in light of this court's recent Title Guarantee decision and for any other action it sees fit to take.

It is further ordered that this Court shall keep jurisdiction of the appeal.

A. Daniel Fusaro
Clerk

s/ Edward (illegible)
Senior Deputy Clerk

Before:

HON. J. EDWARD LUMBARD

HON. STERRY R. WATERMAN

HON. WILFRED FEINBERG
Circuit Judges

Filed U.S. Court of Appeals, April 27, 1976

Filed U.S.District Court May 24, 1976

No. 75-1880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of THE TI CORPORATION (OF CALIFORNIA), *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

MEMORANDUM OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1880

THE TITLE GUARANTEE COMPANY, a Subsidiary of PIONEER NATIONAL TITLE INSURANCE COMPANY, a Subsidiary of TITLE INSURANCE AND TRUST COMPANY, a Subsidiary of THE TI CORPORATION (OF CALIFORNIA), *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

MEMORANDUM OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over three thousand seven hundred (3,700) state and local chambers of commerce and professional and trade

[1] Consents to the filing of this Memorandum from the Solicitor General of the United States and Title Guarantee have been filed with the Clerk of the Court.

associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. The Chamber has sought to advance those interests in a wide spectrum of labor relations litigation before the Court. *E.g., Connell Constr. Co.* v. *Local 100, Plumbers,* 421 U.S. 616 (1975); *Boys Market* v. *Retail Clerks,* 398 U.S. 235 (1970); *Porter Co.* v. *NLRB,* 397 U.S. 99 (1970). The Chamber has also participated *amicus curiae* in *NLRB* v. *Sears, Roebuck and Co.,* 421 U.S. 132 (1975); *Renegotiation Bd.* v. *Bannercraft,* 415 U.S. 1 (1974); *Kent Corp.* v. *NLRB,* — F2d —, (5th Cir. 1976) (No. 74-1710) 92 LRRM 2152; and *Automobile Club of Missouri* v. *NLRB,* — F. Supp. — (D.D.C. 1973) (No. 924-73) all of which involved questions pertaining to the Freedom of Information Act.

The specific issues presented here are:

1. Whether certain materials in possession of the General Counsel of the Labor Board relating to unfair labor practice charges against a charged party are subject to disclosure, prior to an administrative hearing on these charges, pursuant to the terms of the Freedom of Information Act (FOIA). Specifically, the material requested in this case includes "copies of all written statements, signed or unsigned, contained

in the Board's case file . . . " and procured during the investigation of the unfair labor practice charges.

2. Whether the FOIA confers upon federal courts the authority to enjoin scheduled administrative hearings until the charged party has a reasonable opportunity to review the requested material.

These issues are of particular concern to the Chamber's members who like most employers are subject to the Labor Board's jurisdiction. Moreover, the decision of the Court of Appeals, permitting the General Counsel to withhold the material requested, is antithetical to the letter as well as to the legislative policy under-pinning the FOIA, and injures not only employers, but labor organizations who appear as defendants before the General Counsel in evidentiary hearings. The erroneous rationale under-pinning the opinion below, while pertaining specifically to the Labor Board, may well be applied to other governmental agencies to the grave detriment of private parties appearing before them. Because the ultimate resolution of the issues presented here is of vital concern to its members, the Chamber believes it is appropriate to present its views in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT

I. The Uncontested Facts

In late May 1975, the Union [2] filed refusal to bargain charges under the National Labor Relations Act (29 U.S.C. § 141 *et seq.*) against Title Guarantee. The Board's New York Regional Office conducted an *ex*

[2] District 65, Wholesale, Retail Office and Processing Union, Distributative Workers of America.

parte investigation of the Union's allegations. Board personnel obtained written statements from Union representatives and officials and from employees of Title Guarantee. As a result of this investigation, the Board's Regional Director issued a complaint on June 30, 1975, charging Title Guarantee with the unfair labor practices alleged by the Union. October 14, 1975, was set as a hearing date.

In July 1975, Title Guarantee requested the Board's New York Office to furnish it with all signed and unsigned written statements obtained during the investigation of the Union's charges against Title Guarantee, as well as any subsequent statements which might thereafter be obtained. The Board's Regional Director refused to furnish Title Guarantee with the requested documents, and on appeal his decision was upheld by the Board's General Counsel in Washington, D. C. Thereafter, Title Guarantee filed the instant cause in the United States District Court for the Southern District of New York to compel disclosure of the requested statements under the Freedom of Information Act (5 U.S.C. § 552).

II. The Decisions Below

After *in camera* review, the District Court relied upon the Court's opinion in *E.P.A.* v. *Mink*, 410 U.S. 73 (1973) to conclude that the factual statements requested by Title Guarantee were not "memorandums or letters" protected from disclosure by exemption (b)(5) of the FOIA.[3] 407 F.Supp. at 501-03. The District Court also rejected the Board's contention that the requested statements were privileged against disclosure before trial by exemptions (b)(7)(A), (C), and (D) of the FOIA.[4] In light of the 1974 amendments to exemption (b)(7) which were intended to narrow its scope, the District Court concluded that "general contentions" alleging interference with enforcement proceedings and effective trial preparation and reluctance of individuals to volunteer information, were insufficient to meet the Board's burden of proof impassed under 5 U.S.C. § 552 (a)(4)(B).[5] 407 F. Supp. at 503-04. The District Court further concluded that the Board had failed to demonstrate how disclosure of the requested materials would adversely affect attorney trial preparation, public access to Board processes, the public's right to privacy, or promises of confidentiality to persons volunteering information to the Board. 407 F.Supp. at 504-05. Accordingly, the District Court directed the Board "to turn over the material sought by [Title Guarantee] for inspection and copying"

[3] 5 U.S.C. § 552(b)(5) provides:

> This section does not apply to matters that are—inter-agency or intra-agency memorandums of letters which would not be available by law to a party other than an agency in litigation with the agency;

[4] 5 U.S.C. § 552(b)(7) exempts from disclosure:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, . . . (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source . . .

[5] This provision provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

before the October 14 hearing date. 407 F.Supp. at 505.

The Court of Appeals (Circuit Judges Moore, Oakes and Meskill) reversed the judgment of the District Court. 91 LRRM 2993. The Second Circuit considered only FOIA exemption (b)(7)(A). It held that under the 1974 amendments to the FOIA, this exemption precludes disclosure of any documents pertaining to a pending enforcement proceeding. 91 LRRM at 2997-98. The Court of Appeals further held that disclosure would "necessarily" enable charged parties to escape responsibility for unfair labor practices and chill employee and union official cooperation with the Board "for fear of incurring employer displeasure". 91 LRRM at 2998. In *dicta,* the Court of Appeals commented that the District Court's refusal to accept the Board's reliance upon FOIA exemptions (b)(5) and (b)(7) (C) and (D) was supported by both reason and precedent. 91 LRRM at 2997 ns. 10 and 11, and 2999 n. 15.

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals rests on an erroneous interpretation of the Congressional purpose expressed in the 1974 FOIA amendments; it nullifies the burden of proof to justify nondisclosure imposed upon all federal agencies by Congress in § 552(a)(4)(B) of the FOIA; and it raises important issues which vitally affect all private parties faced with law suits instituted by federal agencies. Review by the Court is thus fully warranted.

1. Congress intended to narrow the scope of the (b)(7) exemption against disclosures. Senator Hart sponsored this amendment (120 Cong. Rec. S.9337

(1974)), and the statutory language was designed to eliminate the prevailing practice approved by certain courts under which federal agencies frustrated disclosure by simply stating that the requested documents were part of an "investigatory file." Legislative History, Texts, and Other Documents (March 1975) 332 (Remarks of Senator Hart).[6] In response to a question from Senator Kennedy, Senator Hart stated (120 Cong. Rec. S. 9334 (1974)) that the amended language was specifically fashioned to overrule cases like *Weisberg* v. *Dept. of Justice,* 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 993 (1974) and *Center for National Policy* v. *Weinberger,* 502 F.2d 370 (D.C. Cir. 1974) which had engrafted such broad protection upon exemption (b)(7). Although the Court of Appeals disclaimed making "the broad determination that any investigative information obtained in connection with a pending enforcement proceeding is per se nondisclosable," its ruling, in effect erroneously re-established as a matter of law that all materials related to an ongoing unfair labor practice enforcement proceeding are exempt from disclosure until the case is closed. Senator Hart's amendment did not deal only with closed files but active cases, and his amendment was fashioned to preclude any broad blanket of secrecy by requiring "the agency to show why the disclosure of the particular document should not be made." Source Book 332 (Remarks of Senator Hart). See also Source Book 293 (Remarks of Senator Kennedy). In *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132 (1975), the Court declined to consider the narrowed scope of the (b)(7) exemption. 421 U.S. at 162-65. The instant petition presents a timely and appropriate occasion to do so.

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[6] Hereinafter cited as "Source Book".

2. Section 552(a)(4)(B) of the FOIA imposed upon the agency raising an exemption to disclosure the burden to justify its action. The Court of Appeals erroneously ruled (91 LRRM at 2998), contrary to the District Court, that this "burden" was met by unsupported oral allegations that employees "may be reluctant" to volunteer information to the Board for fear of employer retaliation, and charged parties "might be able" to construct defenses to avoid liability for alleged unfair labor practices. However, under the amendment to (b)(7) the burden is not met by such vague assertions; rather the agency must demonstrate that its prospective case would actually be harmed by pretrial release of the requested statements. Source Book 333 (remarks of Senator Hart). As the Fifth Circuit has observed, such a showing should be made by affidavit evidence, oral testimony, as well as *in camera* inspection. *Kent Corp.* v. *NLRB,* — F.2d — (5th Cir. 1976) (No. 74-1710), 92 LRRM 2152, 2160 n. 30. The Second Circuit's failure to require positive factual demonstration of "interference" under exemption (b)(7) is contrary to the 1974 legislative amendments to this exemption, and nullifies the express Congressional statutory direction that agencies have the burden of justifying nondisclosure.[7] This interpretation runs directly counter to the manifest purpose of § 552(a)(4)(B) and, unless corrected, will frustrate the Congressional policy of ending government secrecy.

[7] Indeed, the First Circuit has recently interpreted the instant ruling as shifting this burden to the party seeking disclosure. *Goodfriend Western Corp.* v. *Fuchs,* — F.2d — (1st Cir. 1976) (No. 76-1116), 92 LRRM 2466, 2467. Such a holding is flatly inconsistent with the statutory language in § 552(a)(4)(B) of the FOIA.

The exemptions to the FOIA were not intended by Congress to be triggered by real or imagined Labor Board fears of employer retaliation against government witnesses. Rather, in the National Labor Relations Act itself "Congress . . . made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash* v. *Fla. Indus. Comm'n,* 389 U.S. 235, 238 (1967). Thus, the protection against any retaliations set forth in § 8(a)(4) of the Act[8] has been broadly interpreted by a unanimous Court to include persons who give "a written sworn statement to a Board field examiner investigating an unfair labor practice charge." *NLRB* v. *Scrivener,* 405 U.S. 117, 125 (1972). See also *NLRB* v. *Local 22, Marine Wkrs.,* 391 U.S. 418 (1968) (§ 8(b)(1)(A) protects union members from expulsion from union for filing charges with NLRB). This statutory protection applies to all persons who cooperate with Board conducted investigations regardless of whether they are actually called as witnesses, or the case settles before trial as a large percentage of such cases do.

The Board's steadily increasing caseload suggests that employees are aware of or informed of this express

[8] This provision of the National Labor Relations Act provides:

> It shall be an unfair labor practice for an employer—
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act . . .

While this provision reads "testimony" rather than evidence or statements, nothing in the legislative history surrounding its enactment suggests the Congress intended to protect only persons who actually testify in Board conducted hearings.

statutory protection and pre-trial cooperation seems readily securable.[9] And if Board personnel are candid with persons cooperating with pre-complaint investigating, these persons are advised before trial that there is reasonable expectancy they will be called to testify at a public hearing in the presence of their employer. Thus assuming *arguendo* any fear of reprisal, it makes little difference to the employee whether his name is revealed to his employer before or at the time of trial. Risk of reprisal is logically no greater whether identity is disclosed before trial or during it. It follows that disclosure of the statements requested by Title Guarantee cannot fairly be assumed to frustrate employee cooperation with Board agents during investigation of unfair labor practice charges.

The Court of Appeals also improperly assumed charged parties might use pre-trial disclosures to escape liability for unfair labor practices. A more reasonable assumption would be that such information would enable an employer or labor organization to "deal effectively and knowledgeably with the Federal agencies" (S.Rep. No. 813, 89th Cong., 1st Sess., 7 (1965)), and thereby to settle or litigate on the basis of the actual strengths and weaknesses of the government's case. It is precisely this right that the FOIA intended to secure. See, *e.g., NLRB* v. *Schill Steel Prods. Inc.*, 408 F.2d 803, 805 (5th Cir. 1969).

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[9] Section 11 of the Act, 29 U.S.C. § 161 authorizes the Board to compel persons, including employees, to give statements to Board agents during the investigation of unfair labor practice charges. Cf. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 768 (1969). Such persons are also protected by § 8(a)(4). *Pederson* v. *NLRB*, 234 F.2d 417, 420 (2d Cir. 1956).

3. The Court should also review the scope of the other exemptions raised and fully litigated by the Board before the District Court. Otherwise private parties seeking pre-trial documents must await piecemeal litigation before a comprehensive resolution of the scope of exemptions (b)(7)(C) and (D) and (b)(5) will be forthcoming. The scope of these exemptions have divided federal district courts[10] and thus resolution by the Court is now timely. For the reasons stated by the District Court in the instant case, the Chamber submits that these exemptions do not preclude disclosure of statements before trial to a charged party sued by the Board's General Counsel.

4. District Courts have also reached directly contrary rulings whether scheduled Board conducted hearings may be enjoined pending resolution of disclosure issues raised under the FOIA. Compare, *e.g., AU & Son, Inc.* v. *NLRB*, — F.Supp. — (W.D.Pa. 1976) (No. 76-027) 91 LRRM 2430, 2431; *with Capital Cities* v. *NLRB*, — F.Supp. — (N.D.Cal. 1976) (No. C-75-2352) 91 LRRM 2565, 2566. The District Court entered such an injunction (407 F.Supp. at 505-06, 506-08), and the Court of Appeals did not question the propriety of granting injunctive relief under the FOIA.

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[10] *Compare, e.g., Barnes & Noble Bookstores* v. *NLRB*, — F. Supp. — (S.D.N.Y. 1976) (No. 76C-1168) 92 LRRM 2169; *McDonnell Douglas Corp.* v. *NLRB*, — F.Supp. — (D.C.Cal. 1976) (No. CV 76-0409) 92 LRRM 2072; *Bellingham Frozen Foods* v. *Henderson*, — F.Supp. — (W.D.Wash. 1976) (No. C76-119m) 91 LRRM 2761; *Atlas Indus.* v. *NLRB*, — F.Supp. — (N.D.Ohio 1976) (No. C-76-27) 91 LRRM 2676; *Local 32, Plumbers* v. *Irving*, — F.Supp. — (W.D.Wash. 1976) (No. C76-39M and C76-100S) 91 LRRM 2513; *NLRB* v. *Hardeman Garmet Corp.*, — F.Supp. — (W.D.Tenn. 1975) (No. C-75-148) 91 LRRM 2232 *with Harvey's Wagon Wheel* v. *NLRB*, — F.Supp. — (N.D.Cal. 1976) (No. C-75-2407) 91 LRRM 2410.

The Senate, at least, was under the impression the Court had held in *Renegotiation Bd.* v. *Bannercraft Co.*, 415 U.S. 1 (1974), "that the FOIA confers jurisdiction on the courts to enjoin administrative proceedings pending a judicial determination of the applicability of the Act to documents involved in those proceedings." Source Book 165 (S. Report No. 93-854, 93d Cong. 2d Sess. (1974)). Any other rule would deprive the party seeking disclosure of an opportunity to prepare defenses or propose settlement prior to commencement of the hearing. The Court should now avail itself of this opportunity to remove any existing ambiguities over the scope of the *Bannercraft* decision.

CONCLUSION

For the foregoing reasons, as well as those advanced by Petitioner, the petition for writ of certiorari should be granted.

Respectfully submitted,

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